

Pages 1 - 85

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jon S. Tigar, Judge

EOLAS TECHNOLOGIES	)	
INCORPORATED,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. CV 17-03022-JST
	)	
AMAZON.COM, INC,	)	
	)	
Defendant.	)	
	)	

Oakland, California  
Thursday, August 6, 2020

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

For Plaintiff Eolas Technologies Incorporated:

MCKOOL SMITH, P.C.  
300 W. 6th Street, Suite 1700  
Austin, TX 78701

BY: JOHN B. CAMPBELL, JR., ESQUIRE  
JOSHUA W. BUDWIN, ESQUIRE  
JAMES E. QUIGLEY, ESQUIRE

For Consol Plaintiff Google LLC:

QUINN EMANUEL URQUHART & SULLIVAN, LLP  
50 California Street, 22nd Floor  
San Francisco, Ca 94111

BY: CHARLES K. VERHOEVEN, ESQUIRE  
DAVID A. PERLSON, ESQUIRE  
FELIPE CORREDOR, ESQUIRE  
CARL G. ANDERSON, ESQUIRE

Reported By: Pamela Batalo-Hebel, CSR No. 3593, RMR, FCRR  
Official Reporter

**APPEARANCES CONTINUED:**

For Defendant Amazon.com Inc.:

LATHAM & WATKINS LLP  
140 Scott Drive  
Menlo Park, CA 94025

**BY: DOUGLAS E. LUMISH, ESQUIRE**  
**RICHARD G. FRANKEL, ESQUIRE**

LATHAM & WATKINS LLP  
555 Eleventh Street, NW, Suite 1000  
Washington, DC 20004

**BY: MELISSA A. SHERRY, ESQUIRE**  
**CHARLES S. DAMERON, ESQUIRE**

LATHAM & WATKINS LLP  
505 Montgomery Street, Suite 2000  
San Francisco, CA 94111

**BY: AMIT MAKKER, ESQUIRE**

HALTOM & DOAN  
6500 Summerhill Road, Suite 100  
Texarkana, TX 75503

**BY: JENNIFER HALTOM DOAN, ESQUIRE**

For Consol Defendant Google LLC:

QUINN EMANUEL URQUHART & SULLIVAN, LLP  
50 California Street, 22nd Floor  
San Francisco, CA 94111

**BY: CHARLES K. VERHOEVEN, ESQUIRE**  
**CARL G. ANDERSON, ESQUIRE**  
**DAVID PERLSON, ESQUIRE**  
**FELIPE CORREDOR, ESQUIRE**

For Consol Defendant Wal-Mart Stores Texas LLC:

WHITE & CASE  
3000 El Camino Real  
2 Palo Alto Square, Suite 900  
Palo Alto, CA 94306

**BY: ERIC E. LANCASTER, ESQUIRE**  
**BIJAL VIJAY VAKIL, ESQUIRE**

WINSTON & STRAWN LLP  
800 Capitol Street, Suite 2400  
Houston, TX 77002

**BY: ROBERT L. GREEN, III, ESQUIRE**

Thursday - August 6, 2020

2:00 p.m.

P R O C E E D I N G S

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**THE CLERK:** Your Honor, now calling Civil Matter 17-3022, Eolas Technologies Incorporated vs. Amazon.com, Inc.

If counsel could please state their appearances for the record, starting with counsel for Plaintiff Eolas.

**MR. CAMPBELL:** Good afternoon, Your Honor. John Campbell for Eolas. Also on the line are my colleagues Josh Budwin and James Quigley.

**THE COURT:** Very good. Welcome.

**MR. CAMPBELL:** Thank you.

**MR. LUMISH:** Good afternoon, Your Honor. Doug Lumish, Latham & Watkins, for Amazon. With me from Latham are Melissa Sherry, Rick Frenkel, Amit Makker, and Charles Dameron. Also from the Haltom & Doan firm is Jennifer Doan, and from the client side. We have Jeff Dean and Scott Stanford, I believe, on the public line.

**THE COURT:** Very good, welcome.

**MR. VERHOEVEN:** Good morning, Your Honor. Charles Verhoeven from Quinn Emanuel on behalf of Google, and we also have David Perlson, Carl Anderson, and -- where is he? He's fallen off the screen -- oh, there he is -- Felipe Corredor. We are ready to proceed, Your Honor.

**THE COURT:** All right. Welcome.

1           **MR. VAKIL:** Good afternoon, Your Honor. This is Bijal  
2 Vakil from White & Case on behalf of Wal-Mart. With me is Eric  
3 Lancaster from White & Case and Robert Green from Winston &  
4 Strawn, and our client, Anna Lowe, is in the public gallery.

5           **THE COURT:** Very good. Welcome. I think we've  
6 covered the waterfront.

7           Who will be arguing for defendants today?

8           **MR. VERHOEVEN:** This is Charles Verhoeven, Your Honor.  
9 I will be arguing the obviousness-type double patenting issue,  
10 and my colleague, co-counsel, Doug Lumish will argue, with  
11 Your Honor's permission, the preclusion issues.

12           **THE COURT:** All right. Very good. That's fine.

13           Mr. Campbell, will you be arguing on behalf of the  
14 plaintiff today?

15           **MR. CAMPBELL:** Yes, I will, Your Honor.

16           **THE COURT:** All right.

17           Well, let me let defendants take it away. What I  
18 typically do is take arguments sort of the way I take the  
19 briefs, and that is, the party that bears the burden makes an  
20 argument and then the party that doesn't have the burden makes  
21 an argument and then the party that has the burden has the last  
22 say.

23           Sometimes in a motion that has this much complexity --  
24 although I don't know how complex it actually is -- and this  
25 many moving parts, it makes sense to actually give the other

1 side a second bite at the apple. Something often comes up in  
2 the reply argument they feel the need to respond to, so we'll  
3 just play that one by ear.

4 Mr. Verhoeven, why don't you take it away.

5 **MR. VERHOEVEN:** Thank you, Your Honor. Just one  
6 second. Here we go.

7 Can everyone see that PowerPoint?

8 **THE COURT:** I can. You're in that sharing mode where  
9 I can see a column of slides on the left, so whatever that is,  
10 F5 on PowerPoint, you know, where you just see the main slide,  
11 you might want to do that.

12 **MR. VERHOEVEN:** Okay.

13 **THE COURT:** I'm not sure it's F5, but I think you get  
14 my meaning.

15 **MR. VERHOEVEN:** Well, I'm showing a full screen-share  
16 right now. No one sees that?

17 **THE COURT:** I have a full screen-share. It's just  
18 that I think you probably right now only want me to see the  
19 slide that says "Defendants Motion for Summary Judgment."

20 **MR. VERHOEVEN:** Yes.

21 **THE COURT:** I can also see to my left a column that  
22 contains, for example, Slide No. 2, "Obviousness-type double  
23 patenting." And maybe --

24 **MR. VERHOEVEN:** Well, I'm not sure what's going on.

25 **MR. PERLSON:** If you just look right below the "A" in

1 the "Wal-Mart," if you go straight below, there's like a little  
2 icon that has a little dot with a line coming out of it. I  
3 think if you click on that, you'll be in presentation mode.

4 **MR. VERHOEVEN:** Okay.

5 **THE COURT REPORTER:** And I don't know -- excuse me.  
6 This is the court reporter. I don't know who just spoke  
7 because of the -- because of the sharing the screen. It  
8 doesn't show all the voices. So whoever just spoke before  
9 Mr. Verhoeven --

10 **THE COURT:** That was Mr. Perlson, I believe.

11 **THE COURT REPORTER:** Thank you.

12 **MR. PERLSON:** This is David Perlson. Apologies.

13 **MR. VERHOEVEN:** Okay. Now, I'm sharing again. I'm so  
14 sorry, folks. I practiced this and everything. And now I'm  
15 going to hit "slide show." It's not working. Oh, boy.

16 Felipe, do you want to just do it, because I don't want  
17 to --

18 **MR. CORREDOR:** Yes.

19 **MR. VERHOEVEN:** Hold on. One more try.

20 **THE COURT:** Mr. Verhoeven, if it puts you at ease at  
21 all, we live in the Zoom times now, so we're used to, you  
22 know -- it's fine. Anyway, it all worked out. Here it is,  
23 presented as you were hoping.

24 **MR. VERHOEVEN:** Yes. I'm trying to get you on the  
25 screen, Your Honor, and then I'll start.

1           Okay. Ready to go.

2           May I proceed, Your Honor?

3           **THE COURT:** Please.

4           **MR. VERHOEVEN:** So I'm going to be presenting today on  
5 obviousness-type double patenting, and all my argument will be  
6 on behalf of all the defendants.

7           So just to go through -- and, Your Honor, stop me at any  
8 time if this is stuff you would rather me not go over, but the  
9 standard for obviousness-type double patenting is laid fourth  
10 here in the *AbbVie* case, and it involves two steps.

11           "First, the Court 'construes the claims in the earlier  
12 patent and the claims in the later patent and determines the  
13 differences.' Second, the Court 'determines whether those  
14 differences render the claims patentably distinct.'" "'A later  
15 claim that is not patentably distinct from', i.e., 'is obvious  
16 over or anticipated by,' an earlier claim is invalid for  
17 obviousness-type double patenting."

18           The next slide here, slide 4, citing the *Georgia-Pacific*  
19 *Corp. vs. U.S. Gypsum* case -- and this also goes on to explain  
20 the purpose of the doctrine: "Obviousness-type double  
21 patenting is a judicially created doctrine grounded in public  
22 policy which, prevents the extension of the term of the  
23 original patent." That's very important. It "prevents the  
24 extension of the term of the original patent via the patenting  
25 of an obvious variation," which is what we have in this case.

1           **THE COURT:** Mr. Verhoeven, let me jump in just to  
2 respond to an invitation that you extended earlier.

3           **MR. VERHOEVEN:** Okay.

4           **THE COURT:** I don't like to tell people -- excuse  
5 me -- I don't like to tell lawyers "talk about this, don't talk  
6 about that" because it's -- I'm always -- I think it's very  
7 possible that they're going to talk about something that I  
8 didn't pay enough attention to in the briefs or that I hadn't  
9 focused on.

10           I did read the briefs very carefully, and the legal  
11 standards seem very clear, and everyone has done a good job of  
12 identifying them and repeating them. The part of your argument  
13 and Mr. Lumish's argument that I'm going to be focused on most  
14 carefully will not be what the legal standards are but to what  
15 extent is the present patent different from the prior patents.  
16 That's where the fight is in the case. It's really a factual  
17 fight.

18           **MR. VERHOEVEN:** Yes, Your Honor.

19           **THE COURT:** So please give the argument you came to  
20 make, but just know that when you get to that point, that's  
21 when my ears will be most up.

22           **MR. VERHOEVEN:** Okay. Well, in light of that,  
23 Your Honor, I'm going to move on to the merits here.

24           In general, Your Honor, the main argument that the  
25 plaintiffs are making to distinguish the '507 patent from the



1 parent patents is the explicit recitation of "World Wide Web,"  
2 "web pages," and "over the web." And I'm going to go into that  
3 in detail, Your Honor, but I think a few things are notable  
4 right off the front.

5 In *Eolas I*, they -- the inventors described their idea in  
6 terms of web pages in *Eolas I*. And in *Eolas/Microsoft* -- and  
7 I'm citing Exhibit 31 for the first point, Exhibit 32 for the  
8 second -- in *Eolas/Microsoft*, it also described the '906 patent  
9 in terms of interactive web pages and sending things over the  
10 web.

11 In *Eolas* -- if you look at the papers across the cases,  
12 they admit that the inventive idea of the '507 patent is listed  
13 as identical to the idea for the parent patents, so in *Eolas I*,  
14 quote, "their idea to embed interactive content directly into  
15 previously static web pages." And that's in *Eolas I*.

16 The very conception, Your Honor -- the very conception of  
17 this alleged innovation was via the use of web pages. In this  
18 case, they state the same idea. "Their idea to embed  
19 interactive content directly into previously static web pages."

20 If you look at Inventor Doyle's testimony from *Eolas I* at  
21 trial, Your Honor, he admitted that the web and web browsers  
22 were part of his invention claimed in the '985 and '906  
23 patents. And I'll just quote it for the record. This is  
24 Exhibit 5, transcript cite 92, 15 through 17; 98, 18 through  
25 21:

1 "Q. What do you call the invention on the two patents in  
2 red here, the '906 and the '985 patents?

3 "A. We call it the interactive web."

4 This is *Eolas I*, Your Honor.

5 "Q. Okay. And tell us what is a browser?"

6 A "browser" is a term claimed in the parent patents,  
7 Your Honor.

8 "Q. What is a browser?

9 "A. A browser as it's used in our invention essentially  
10 means a web browser, a distributed hypermedia browser."

11 So in their own words, Your Honor, in the prior cases,  
12 they describe their very invention, not the accused products,  
13 their invention in terms of the World Wide Web and the use of  
14 the web to -- to combine with something else to have some  
15 interactivity that they claim is novel in *Eolas I*, which of  
16 course the jury found otherwise.

17 Let's go to the actual claim language comparison,  
18 Your Honor, if that's okay. I'm going to use this figure,  
19 Figure 6, just as a handy sort of side illustration as I go  
20 through the claims. I'll note, Your Honor, that Figure 6 is  
21 identical in the '985, '293, and '57 *[sic]* patents so it  
22 applies to both the parent and the '507 patents.

23 So there's a lot of different words that -- our  
24 contention, Your Honor, is that the plaintiff here went and  
25 tried to get a continuation to extend the term, and they, in

1 doing so, intentionally tried to rearrange the wording and make  
2 it look like it was different, but all it is is different words  
3 to claim the same thing. So what I'm going to go through,  
4 Your Honor, real quick here -- and stop me if you want  
5 anything, but these aren't -- these are disputed points. I  
6 just want to run through --

7 **THE COURT:** Mr. Verhoeven, let me interrupt you for  
8 just a second.

9 Do plaintiffs also -- let me just ask them. Do they also  
10 plan to use a PowerPoint presentation?

11 **MR. CAMPBELL:** We do, Your Honor, yes.

12 **THE COURT:** Well, maybe I could -- maybe the parties  
13 could just stipulate that following this, that each of them,  
14 with a CC to the other, could send my courtroom deputy copies  
15 of these PowerPoint presentations, and that will allow me to  
16 pay closer attention and take fewer notes.

17 Would that be all right, Mr. Campbell?

18 **MR. CAMPBELL:** Yes, of course, Your Honor.

19 **THE COURT:** Mr. Verhoeven, does that work for you  
20 also?

21 **MR. VERHOEVEN:** Yes, Your Honor.

22 **THE COURT:** Okay. Very good. Let's plan on doing  
23 that.

24 Mr. Verhoeven, back to you.

25 **MR. VERHOEVEN:** So I'm going to run through the claims

1 in functional terms, and really that's what the test is. When  
2 they're comparing the claims, they're looking at the substance,  
3 not how the words are arranged.

4 So first, the '985 patent, the parent patent, claims "A  
5 method of serving digital information in a computer network  
6 environment."

7 '507, "A method for disseminating interactive content via  
8 the World Wide Web distributed hypermedia network on the  
9 Internet."

10 Functionally, besides the World Wide Web express uses in  
11 '507, they're just describing serving information over a  
12 network.

13 Next slide.

14 Both the '985, claim 40, and the '507, claim 32, also  
15 recite the function of sending and receiving messages over a  
16 network. So if you look at the '985 patent, claim 40,  
17 "communicating via the network server," and '507, using  
18 different words, "receiving, by the server" and "transferring,  
19 by the server." Same functional concept.

20 Browsing being configured with the browser is being  
21 configured with multiple applications. This is true in both of  
22 the patents; in '507, "configuration with the plurality of  
23 different interactive content applications," and the '985,  
24 claim 40, "identifying and locating an executable application."

25 Next slide.

1           Displaying an object in a web. '985 patent, claim 40,  
2       "the object is being displayed within a display area created at  
3       the first location within the portion of the hypermedia  
4       document being displayed." Claim 32 of '507, "said one or more  
5       objects is displayed to the user within at least one of said  
6       one or more World Wide Web pages."

7           Next function of the claim, detecting an object and  
8       displaying a web page. Claim 40 -- claim -- '507 says, "detect  
9       at least part of an object," and to cause a display of the page  
10      to the user. '985, claim 40, "responding to text formats," and  
11      "displaying, on said client workstation, at least a portion of  
12      the document within the browser-controlled window." Different  
13      words, same thing.

14          Next function is selecting an application based on  
15      information. The '507, claim 32, states exactly that. Claim  
16      40 of '985, "identifying and locating an executable application  
17      associated with the object."

18          Both of those are selecting an application based on  
19      information. Just used different words.

20          The next function, automatically invoking an application.  
21      The '507, claim 32, "automatically invoke the selected  
22      interactive content application," for the '507. And for claim  
23      40, "automatically invoking the executable application." Same  
24      thing, slightly different wording.

25          They also recite displaying an object. '507, "while at

1 least part of the object is displayed to the user within the  
2 web." Claim 40, "while the object is being displayed within  
3 the display area."

4 Then finally, Your Honor, they -- they also both invoke  
5 the function of the invoked application being part of a  
6 distributed application, which is another element to the  
7 claims, and they both say that -- I'm not going to read it into  
8 the record. You can see it for yourself.

9 So in our view, the patents are the same. They use  
10 different words. They're functionally claiming the same thing.  
11 I went over that really quickly, Your Honor, in the interests  
12 of time because there is only three disputed issues, and I'd  
13 like to go to those in more detail.

14 So Eolas proffers three alleged points of novelty. The  
15 interactive web is a point of novelty, they say. Secure --  
16 security on the web is a point of novelty, and distribution and  
17 coordination of the applications that provide scalability is  
18 the third thing they point to in their briefing, Your Honor.

19 It's notable that Eolas does not allege any other points  
20 of distinction that they claim are patentable. So we have  
21 three claims, three arguments. Let's address each one.

22 First, the interactive web. There are several points to  
23 make on this, Your Honor. First, the '507 patent expressly  
24 claims, quote, "the web," but that has already been claimed as  
25 a species of the previously-claimed distribution hypermedia

1 network. And this gets esoteric, and it's somewhat unique to  
2 obviousness-type double patenting, Your Honor, but we have  
3 these genus species things that we talk about, and the genus is  
4 broad and the species is more narrow, and the law is that --

5 **THE COURT:** Mr. Verhoeven, one of the pleasures of  
6 this motion is that notwithstanding our reasonably heavy patent  
7 docket here in the Northern District, I've not had one of these  
8 come up before, so I very much enjoyed working on this motion,  
9 actually.

10 **MR. VERHOEVEN:** Yeah.

11 So a "disclosure of a small genus may anticipate the  
12 species of that genus even if the species themselves are not  
13 recited." And the question is would someone -- would a person  
14 of ordinary skill know that species included in the genus, and  
15 we'll go into that, but obviously in this case, yes. The  
16 answer is yes.

17 I have a couple of examples, Your Honor. I don't know if  
18 you want me to go through the case law, but tell me if you  
19 don't.

20 The first is a chemistry example from the Eli Lilly case  
21 versus Barr Labs, and I'll just run through the quote here.

22 "Moreover, we find Lilly's argument to be disingenuous  
23 because it seeks to use the broad coverage of claim 1 of the  
24 '985 [sic] patent as both a sword and a shield. Throughout the  
25 term of the '98 [sic] patent, by virtue of claim 1's broad

1 language, Lilly possessed the right to exclude other parties  
2 from administering any of the thousands of claimed compounds,  
3 including but not limited to" the species -- alleged species in  
4 that case, and I'm going to butcher it -- "fluoxetine  
5 hydrochloride, to treat depression." The case continues,  
6 "Thus, for example, if another party attempted to use" this  
7 hydrochloride to treat depression, Lilly could have sued them  
8 under the '985 [sic] patent for infringement.

9 "With the '98 [sic] patent now expired" -- I'm going down  
10 to the end of the quote -- "Lilly cannot hide behind its  
11 once-advantageous broad coverage and argue that selecting" this  
12 particular hydrochloride "from the class of compounds defined  
13 by claim 1 the '985" -- "'895 patent would not have been  
14 obvious."

15 So I like Venn diagrams, Your Honor. I've got a few of  
16 them in here. The claim 1 of the parent said "administering a  
17 compound" -- "administering compound to treat depression" and  
18 didn't identify the specific compound. It's a broad category.  
19 But people in the art knew that this particular fluoxetine  
20 hydrochloride is something that people administered for  
21 depression. They knew that. And the court saying if they  
22 would have used that, you would have -- you could have sued  
23 them -- if they would have used this particular hydrochloride  
24 in the parent case, the parent patents would allege  
25 infringement because of the broader administering the compound



1 to treat depression.

2 **THE COURT:** You know, I think I have the analogy.

3 **MR. VERHOEVEN:** Yeah. And that's exactly what we have  
4 here, Your Honor. We have the broad parent patents talking  
5 about distributed hypermedia network and the species being the  
6 World Wide Web and -- as a particular network.

7 **THE COURT:** And you were sued under those patents;  
8 correct? Your client was previously sued under the --

9 **MR. VERHOEVEN:** Yes, that's correct.

10 **THE COURT:** For infringing products -- allegedly  
11 infringing products that --

12 **MR. VERHOEVEN:** That used the web.

13 **THE COURT:** -- that existed on the web, right.

14 **MR. VERHOEVEN:** That's right, Your Honor.

15 And the allegation was made that the broader genus,  
16 distributed hypermedia network, included the World Wide Web.  
17 And that's where you get the inventor talking about how to use  
18 the web and modified it to come up with his invention. That's  
19 why you get in the *Microsoft* and the *Eolas I* cases the  
20 description of the very idea of the invention and -- both by  
21 the inventor and by *Eolas* itself -- the web was part of it.  
22 They modified -- what did they modify? They modified a web  
23 page.

24 So clearly -- I'll get into this more, but clearly a  
25 person of ordinary skill would know reading the

1 specification -- common specification here, Your Honor, that  
2 the World Wide Web is an option.

3 Okay. I'm going to skip this example in the interests of  
4 time and show you a picture of what I just said.

5 So the Worldwide -- this is slide 28, and I'm citing the  
6 '507 patent and the common specification, column 5, lines 32  
7 through 35, but you will see in the specification "an example  
8 of an open distributed hypermedia system is the so-called World  
9 Wide Web implemented on the Internet and discussed in the  
10 papers such as the Berners-Lee reference given above."

11 So here the question is would a person of ordinary skill  
12 looking at the parent patent have known that this distributed  
13 hypermedia genus would encompass the web. Well, the  
14 specification only identifies the web, so the answer to that is  
15 obviously yes.

16 So therefore our first argument is because the web was a  
17 well-known subset of a distributed hypermedia network, Eolas'  
18 web distinction or argument fails to provide a patentable  
19 distinction, something that is new or unique.

20 Second point, Your Honor, if you look at some of the  
21 dependent claims -- we have listed two dependent claims here.  
22 These are from the parent claims, the '985, claim 42, and the  
23 '293, claim 11. And I'll just use '985 because they say the  
24 same thing both: "The method of claim 41 where: the text  
25 formats are HTML tags."

1 Well, an HTML tag is part of the web. It's a standard  
2 that was written by Tim Berners-Lee to create the web. HTML is  
3 a language. And these clearly refer to HTML web tags. A  
4 person of ordinary skill would know that.

5 In the claim -- excuse me -- in the common specification,  
6 Your Honor -- I'm at slide 30 now, column 5, lines 26 through  
7 29, quote, "It is a 'hypermedia' system because it is able to  
8 handle hypermedia documents as described above via standards  
9 such as the HTTP and HTML." Yes. Those --

10 **THE COURT:** Mr. Verhoeven, you're familiar with the  
11 portion of defendant's brief that recites places, where in  
12 their claim construction briefs and other documents, the  
13 plaintiffs earlier took the position that this earlier  
14 technology covered the web; correct?

15 **MR. VERHOEVEN:** Yes.

16 **THE COURT:** What position do the defendants take at  
17 those times regarding that same issue?

18 **MR. VERHOEVEN:** That's a really good question. I  
19 wasn't in those trials, but I think the trials were focused  
20 mostly on invalidity. Mr. Lumish was in those trials. He  
21 could speak up to that question, if it's okay.

22 **THE COURT:** Okay. It's just -- I have to say before  
23 we get to this, it's really just a point of curiosity for me.  
24 The positions that people take in claim construction briefs and  
25 that sort of thing really don't have any life past the claim

1 construction hearing for me typically. They don't tell me very  
2 much, but I was just curious.

3 **MR. LUMISH:** Your Honor, this is Doug Lumish speaking.  
4 I can address that point now or do it when it's my turn --

5 **THE COURT:** Why don't we just wait until it's your  
6 turn because it feels like a little bit of a distraction. It  
7 just came to my mind while Mr. Verhoeven was talking.

8 **MR. LUMISH:** I will do so. Thank you.

9 **THE COURT:** Thanks.

10 **MR. VERHOEVEN:** So just to summarize this slide,  
11 Your Honor, slide 30, this common specification expressly  
12 describes a hypermedia system which is expressly claimed in the  
13 parent patents as being able "to handle hypermedia documents as  
14 described above via standards such as the HTTP and HTML  
15 hypertext transmission and markup standards."

16 Those two references, HTTP and HTML, are languages created  
17 by Tim Berners-Lee when he created the World Wide Web.

18 And here, Your Honor, on slide 32, this is from the trial  
19 in *Eolas I*. Trial transcripts, pages 47, lines 9 through. Tim  
20 Berners-Lee is on the stand:

21 "Q. In what languages is the web written in?

22 "A. Well, I designed a couple of languages just as part of  
23 the engineering, HTML and HTTP.

24 "Q. HTML being Hypertext Markup Language?

25 "A. Yeah. Hypertext Markup Language."

1           So the guy who created the web wrote these programs and  
2           created these standards, and they're expressly in the dependent  
3           claims of the parent patents. So that provides further  
4           evidence. You could even look at -- now I'm on slide 33 --  
5           at -- Eolas' expert, Dr. Martin, testified in *Eolas I*. In  
6           *Eolas I*, not here.

7           "A. HTML is one of the primary characteristics of a web  
8           browser, and for that reason, yes, in my opinion, a browser  
9           application as used in the '906 and '985 patents would have to  
10          support HTML."

11          **THE COURT:** Mr. Verhoeven, hold that slide on the  
12          screen for just a second, please.

13          **MR. VERHOEVEN:** While Your Honor is writing, for the  
14          record, this is Exhibit 35 to the papers at 33, lines 2 through  
15          7.

16          **THE COURT:** All right. Go ahead. Thank you.

17          **MR. VERHOEVEN:** In his expert report also, Dr. Martin  
18          declared that, "The World Wide Web is built upon technologies  
19          called HTTP, HTML... The web pages delivered and displayed are  
20          written in HTML."

21          So Eolas itself -- there is so much evidence of this, I  
22          don't know where to stop. Slide 35, Exhibit 32 of the papers,  
23          is *Eolas/Microsoft's* claim construction brief, so this is the  
24          parent patents, and when they're discussing the parent  
25          patents -- when he is discussing the parent patents -- excuse

1 me -- when Eolas is discussing the parent patents in its claim  
2 construction brief in the *Microsoft* case, they stated, "The web  
3 is also characterized by a set of standard data formats," just  
4 like it says in the specification, Your Honor, "including  
5 Hypertext Markup Language, HTML."

6 So, Your Honor, we believe that we have shown for our  
7 papers and argument that the web is claimed as a species of  
8 distributed hypermedia network environment in the parent claims  
9 based on the way it was characterized, based on the way the  
10 inventor testified how he conceived of the invention, based on  
11 representations by Eolas, based on the law of genus species,  
12 and based on the fact that dependent claims of the parent  
13 patents expressly require a web, HTML, in part of the -- as  
14 part of the dependent claim.

15 **THE COURT:** Mr. Verhoeven, why does the PTO allow the  
16 patent to issue if that's true?

17 **MR. VERHOEVEN:** Well --

18 **THE COURT:** The only reason I ask -- I don't know that  
19 I would have asked that question, but, you know, in their  
20 opposition to your motion, the plaintiffs are very excited  
21 about this point, and they spill a lot of ink on it so I wanted  
22 to ask you.

23 **MR. VERHOEVEN:** Well, my first point is I think  
24 they're doing that because they don't have anything else to  
25 say. But, you know, if they're right, then there's -- we don't

1 need the district court in patent cases, do we, because the  
2 double patenting -- if the Patent Office doesn't find it, it  
3 isn't there, but that's not the law, obviously. And I will  
4 note, Your Honor --

5 **THE COURT:** I think better of the question, actually.

6 Mark Lemley wrote an article about a dozen years ago --  
7 maybe it's 10, I don't know -- on this point that you just  
8 made, which is why do patents escalate to the -- why is it a  
9 good thing that patents escalate to the district court.

10 Anyway, I won't take any more of your time. You don't need to  
11 answer that question.

12 **MR. VERHOEVEN:** Okay. All right.

13 So I'm transitioning here, Your Honor, from the point I  
14 was making, that the parent patents actually claimed as a  
15 species of distributed hypermedia network environment the web.  
16 Although they didn't expressly use the word "web," all the  
17 evidence we just went through shows that the inventors used the  
18 web to create their invention, and in the lawsuits, they --  
19 prior lawsuits against Google and other defendant's, they  
20 alleged that the web infringed their distributed hypermedia  
21 network environment. However, even if it isn't claimed, it  
22 would have been obvious to use the web as the distributed  
23 network.

24 So we think it's claimed, but even if -- even if you  
25 disagree, Your Honor, we -- at least we would argue it's

1 obvious to use the web as the distributed hypermedia network,  
2 and here are the reasons.

3 All of the parent patents and the '507 patents share the  
4 exact same specification. The parent patents and the '507  
5 patents disclose the exact same figures. The specification --  
6 there is only one, so I call it the "common specification."  
7 The common specification discloses only one embodiment, the  
8 World Wide Web. I mean, that's the only example they give in  
9 the specification, and their argument wouldn't have been  
10 obvious to use the web when they used it themselves as the sole  
11 embodiment example of a hypertext media system.

12 And finally, Your Honor, there's law out there saying even  
13 if they didn't claim it like I said they did, incorporation of  
14 existing routine Internet technology into existing processes  
15 does not create a patentable distinction, and I would cite to  
16 the *Soverain Software* case talking about open market. It says  
17 "Open market did not invent the Internet or hypertext or the  
18 URL. Newegg is correct that the use of hypertext to  
19 communicate a statement document or transaction detail document  
20 was a routine incorporation of internet technology into  
21 existing processes. We conclude that Newegg presented clear  
22 and convincing evidence of obviousness of claims," and it goes  
23 on.

24 Here that's all -- even if we're just looking at the  
25 parent patents, that's all they did, and that's one of the



1 reasons, probably, why the jury found the patents invalid.

2 You might hear an argument -- now I'm going to transfer to  
3 go over to some of the counter-arguments in the briefing really  
4 briefly, Your Honor.

5 You might hear an argument that it's inappropriate to look  
6 at prior art when you are doing the double patenting analysis,  
7 and this is where the doctrine gets kind of tricky and  
8 esoteric. So --

9 **THE COURT:** Don't you have a footnote in your reply  
10 brief that says, "Oh, we only cited one piece of prior art  
11 anyway. Go get over yourselves." Don't you have a footnote  
12 that says something like that?

13 **MR. VERHOEVEN:** We might. I don't remember off the  
14 top of my head, Your Honor, but the -- the law is you can  
15 consider the intrinsic evidence when you're doing double  
16 patenting. You don't consider prior art. It has prior art to  
17 see if it's anticipated or obvious, but as this states in this  
18 *AbbVie/Mathilda*, "in a double patenting inquiry,...the  
19 disclosure may be used" -- the disclosure of specifications --  
20 "may be used...to answer the question whether claims merely  
21 define an obvious variation of what is earlier disclosed and  
22 claimed."

23 So if you -- if we hear an argument that you can't  
24 consider the parent patents because they're prior art, this  
25 case makes it very clear that you can consider the parent

1 specification and the '507 patent. We'd be in a bind if you  
2 couldn't consider the parent specification, Your Honor, because  
3 it's exactly the same as the '507 patent.

4 **THE COURT:** Okay.

5 **MR. VERHOEVEN:** In Eolas' brief -- and this is a big  
6 question mark to me. I don't know why they were doing it, but  
7 they repeatedly point to the fact that defendants in the prior  
8 cases distinguished the parent patents and said they're not  
9 limited to the web as part of their validity analysis,  
10 Your Honor. And they say because that distinction was made,  
11 it's clear the web would have been a new and unique addition to  
12 the claims, and I just cite one thing here. I won't read it.  
13 But Eolas -- it's a logical fallacy. Saying a claim is not  
14 limited to X does not mean that X would be a new and unique  
15 addition to the claim.

16 **THE COURT:** No. I get your point. That point -- you  
17 like Venn diagrams, by the way, as I also do. I understand  
18 that the small circle sits in the big circle here.

19 **MR. VERHOEVEN:** Okay.

20 And just really briefly, Eolas says in its briefs, we  
21 don't provide any motion [*sic*] to modify the claims, no  
22 motivation to combine.

23 Motivation to combine is not a factor, just like the prior  
24 art. It's not a factor in obviousness-type double patenting,  
25 and we cite the *Geneva Pharm* case. "Obviousness requires an

1 inquiry into a motivation to modify the prior art; nonstatutory  
2 double patenting does not."

3 Same thing with secondary considerations in the validity  
4 analysis. They don't apply here. So Eolas argues at page 22  
5 of its brief, "defendants do not...discuss any secondary  
6 considerations of non-obviousness." But the same -- well, I  
7 guess we have a different case here. But the objective  
8 indicia, secondary considerations, or whatever you want to call  
9 them, are not appropriate for OTDP, and here we cited two  
10 cases. This is the *Geneva* case again. The judge continues,  
11 "Obviousness requires inquiry into objective criteria  
12 suggesting non-obviousness." That's secondary considerations,  
13 Your Honor. Semicolon, "nonstatutory double patenting does  
14 not."

15 And so I won't spend time on the next case. The point is  
16 that these -- these swings at us are miffs because these aren't  
17 requirements for obviousness-type double patenting. Secondary  
18 considerations is not, nor is a requirement to show a  
19 motivation to combine.

20 So that concludes my presentation on the first  
21 distinction. The second two will be much quicker, Your Honor.

22 The second distinction that Eolas argues is patentable is  
23 this item 2, secure --

24 **THE COURT:** Mr. Verhoeven, this is the only motion I  
25 have on calendar this afternoon so I hadn't thought to provide

1 time limits, but we're at 2:41. Mr. Lumish hasn't talked,  
2 Mr. Campbell hasn't talked, and you've not had a reply  
3 argument, and Mr. Campbell has not had the opportunity to think  
4 of whether he wants to ask me for one. So with all of those  
5 things in mind, I have to ask how much longer you think you  
6 might be?

7 **MR. VERHOEVEN:** I could do it in five minutes.

8 **THE COURT:** Go.

9 **MR. VERHOEVEN:** Is that too long?

10 **THE COURT:** No. It was a question. I mean, I  
11 always -- I'm always torn between just letting the lawyers run  
12 the show and giving time limits, but that horse already left  
13 the barn. I didn't give anybody any time limits. So -- yeah.  
14 And I don't want to prejudice your opponent.

15 **MR. VERHOEVEN:** I understand, Your Honor. I will move  
16 very quickly.

17 So the second of the three prongs that they say is a point  
18 of novelty is the security. And since these are going to be  
19 delivered to Your Honor, I'm not going to read them all, but  
20 I'll just --

21 **THE COURT:** On this, I would say you could probably  
22 keep your powder dry until reply.

23 **MR. VERHOEVEN:** Okay.

24 **THE COURT:** Because what you say in your brief is that  
25 stuff is nowhere in the patent.

1           **MR. VERHOEVEN:** Right.

2           **THE COURT:** They invented that for purposes of this  
3 motion.

4           **MR. VERHOEVEN:** That's right.

5           **THE COURT:** So why don't you see if Mr. Campbell  
6 scares you when it's his turn and makes you nervous or makes  
7 Mr. Lumish nervous, and if you're nervous, you can handle it in  
8 reply.

9           **MR. VERHOEVEN:** Well, I like the way you put that,  
10 Your Honor.

11           **THE COURT:** You can also be very Steve McQueen about  
12 it and just say, "I heard what Mr. Campbell said; I'm not  
13 nervous," and just leave it at that, so we'll see what happens.

14           **MR. VERHOEVEN:** Okay.

15           I'm trying to walk through this to find where the  
16 second -- the third distinction is scalability, and "Eolas  
17 argues that 'the asserted claims...provide new scalability and  
18 resource allocation." And this is the same argument,  
19 Your Honor, so maybe I should skip this one, too. But they're  
20 citing the spec that just says this helps with scaling and  
21 resource management. It's not a claim. It's a discussion  
22 about how the actual claim helps things, and if you look at the  
23 claim language, there's nothing about security -- I'm sorry --  
24 about scalability, scaling, resource management, capacity or  
25 workload. It's -- the claim language is the claim language,

1 and it just doesn't have those words.

2 **THE COURT:** Yeah.

3 **MR. VERHOEVEN:** And so I will -- I will save this for  
4 rebuttal, unless Your Honor wants me to cover this particular  
5 one as well. It's the same argument. It's not claimed.

6 **THE COURT:** Well, that's interesting. No. That's  
7 fine.

8 And I will -- when I get your PowerPoints, I'm going to  
9 read over them, so if there are any slides that either of you  
10 skip in your presentations, I'll read them. Sort of have my  
11 cake and eat it too.

12 **MR. VERHOEVEN:** Okay. So just to summarize on these  
13 second two points, Your Honor, both of these -- Eolas  
14 desperately went back to the spec to try and find something  
15 they could claim and say it's a point of distinction, and in  
16 both cases, they're pointing to language that is talking about  
17 the results of -- of the claimed innovation. And -- where is  
18 that slide?

19 We cite to case law in here, and I can't find it, that  
20 pointing to results is fine, but it's not claim language, and  
21 you can't interpret the claim language to require the results.

22 **THE COURT:** Yes.

23 **MR. VERHOEVEN:** And when Mr. Lumish is talking, I'll  
24 find it and let you know, Your Honor.

25 But the gist of our argument on both these two arguments,

1 scalability and security, is there is no claim language  
2 requiring it. If you look at where it exists, it's in the  
3 spec, and it's talking about results or benefits of what is  
4 claimed but not what is claimed. And the law is very clear,  
5 you cannot -- you cannot interpret a claim to include results  
6 that might happen or might not happen that you allege.

7 And so with that, Your Honor, I will reserve the rest of  
8 any time I have to rebuttal.

9 **THE COURT:** Mr. Lumish.

10 **MR. LUMISH:** Thank you, Your Honor. And just to  
11 orient myself, how much time do I have?

12 **THE COURT:** Well, let's talk about that. As I said, I  
13 didn't set time limits so whatever number I gave you now would  
14 be arbitrary.

15 Mr. Campbell, how long is your argument? Let me put it  
16 this way. I have two things. One is an absolute limitation  
17 that at 4:00, I have another Zoom meeting I have to be in. I'm  
18 more -- a less firm limitation is that the human mind likes  
19 watching Zoom for less than an unlimited amount of time. It  
20 does an increasingly poor job of absorbing information. Now,  
21 I'll compensate that by trying harder when Mr. Campbell is  
22 talking, but it's now 2:46, so, Mr. Lumish, I think I should  
23 ask you the question, how long do you think you need?

24 **MR. LUMISH:** Your Honor, if I could have 20 minutes, I  
25 can get it done in there. If I could have 25, I would be

1 extremely grateful, but I can do it all in 15 if I need to as  
2 well.

3 **THE COURT:** I think, out of fairness to Mr. Campbell,  
4 15 is what I should be giving you.

5 **MR. LUMISH:** All right.

6 Mr. Verhoeven, will you stop sharing your screen, please?

7 **MR. VERHOEVEN:** Oh, yes. Sorry.

8 **MR. LUMISH:** Your Honor, I will jump right then to the  
9 merits here and go as quickly as I can to try to point out what  
10 I think is the most salient points for why collateral estoppel  
11 and the Kessler doctrine should govern and hold that the '507  
12 patent is equally invalid as the '985 was in Texas.

13 And so I'll start here if I can, which is with the legal  
14 standard but not because you don't know it but because the  
15 parties actually agreed on it.

16 So what you have on your screen here is slide 2. This is  
17 the opposition brief from Eolas. So this is what they wrote to  
18 the Court. And they cite the *Ohio Willow Wood* case, which I  
19 would argue is the most important case for Your Honor to  
20 understand for collateral estoppel in this dispute, and they  
21 note that collateral estoppel is not limited to identical  
22 patents, which we completely agree with. And the test is  
23 what's highlighted down towards the bottom of this excerpt,  
24 which is that "if the differences between the unadjudicated  
25 patent claims and the adjudicated patent claims do not



1 materially alter the question of invalidity, then collateral  
2 estoppel applies."

3 So a lot of the same evidence that you heard goes to the  
4 same question here for collateral estoppel but under a  
5 different standard, under a different test, and one I think  
6 that cannot be met by Eolas. They cannot show that there is a  
7 materially different question of invalidity, and we will show  
8 you that there is in fact no difference between the question.

9 So the parties agree that the patents don't have to be  
10 identical, and Eolas makes these three very fine distinctions  
11 between the three claims. And when you look at the *Ohio Willow*  
12 *Wood Company* case -- and you asked about things that weren't in  
13 the briefs -- I want to focus next on that case and what its  
14 claims were because you'll see it sets the benchmark for what's  
15 not good enough.

16 Collateral estoppel was found in *Ohio Willow Wood*, and it  
17 shows you that its claims were not good enough, and the fine  
18 distinctions that Eolas tries to draw are not even close to the  
19 substantive changes that you saw in *Ohio Willow Wood*. So let  
20 me show you that, if I may.

21 This is slide 3, and on the left what we have is the  
22 original claim or the '182 patent claim from the *Ohio Willow*  
23 *Wood* case, and coincidentally like this case, it was found  
24 invalid in a case in East Texas. So the one on the left is the  
25 adjudicated claim. The claim on the right is the unadjudicated

1 claim, the one that was presented to the district court in Ohio  
2 and asked to have collateral estoppel applied to it and that  
3 the Federal Circuit then ruled upon.

4 And what you will see in the highlighting are things in  
5 the right in the unadjudicated claim that are simply not found  
6 on the claim on the left. And some of the them, the Federal  
7 Circuit says, are just the same thing in different words, but  
8 others they say are actually substantive differences.

9 So let me put on a pen here. If you can see my little  
10 laser pen. Starting with the yellow text, it talks about this  
11 covering. What the patent is about is a covering that you put  
12 over an amputated limb to make a prosthetic more comfortable.  
13 That's the fundamental invention. And the adjudicated patent  
14 just called it a cushion liner for enclosing an amputation  
15 stump.

16 On the right, we see the unadjudicated claim was more  
17 narrow, more specific. It required a tube-sock-shaped  
18 covering. You see that in the first line there and then about  
19 six lines down in the middle of the claim. So it had to have a  
20 particular shape. There is no shape on the left. It just has  
21 to be a cushion liner for enclosing an amputation stump.

22 The amputation stump itself, that's referred to in both  
23 claims, but in the unadjudicated claim, the  
24 collateral-estoppel-based claim, it's referred to only as an  
25 amputation stump being a residual limb.

1           Now, I don't think there is a meaningful difference  
2     between those two things, and I think the Federal Circuit says  
3     this is an example of just claiming the same thing with  
4     different words, and that's not good enough to get out from  
5     collateral estoppel.

6           **THE COURT:** Yes.

7           **MR. LUMISH:** When you get to the bottom, this is where  
8     I think the action really is, Your Honor, because these are --  
9     and I think the Federal Circuit says it plainly -- substantive  
10    changes or differences between the two claims, and there are  
11    far greater differences in the *Ohio Willow Wood* case claims  
12    than the three distinctions that Eolas tries to draw today.

13          So first is you have -- well, sort of together in purple  
14    and in orange, you have a foamed or non-foamed block copolymer  
15    as a coating on this covering. It's this tube-sock-shaped  
16    covering. If you look over on the left side, you won't see any  
17    of that. It's not foam. It's not non-foam. There is no  
18    constraint that it has to be one or the other or that it's open  
19    to both, and it talks only about any polymeric cushioning gel  
20    being enough.

21          Now, a block copolymer, that's not any polymer. A block  
22    copolymer is a very specific thing. Blocks are a collection of  
23    monomers, you know, molecules that have differences from block  
24    to block to their adjacent blocks. They collect some monomers  
25    in one block, others in a different one, and they're different

1 from each other. So the one block has differences from its  
2 adjacent block. A polymer is just any long chain of molecules.

3 So this is absolutely a narrowing in the claim language,  
4 and *Ohio Willow Wood* argued that it was a substantive change in  
5 their claims, and the Federal Circuit says it is, but it's  
6 still not enough. So we have to have a block copolymer on the  
7 right, not just any polymeric gel. It has to be foamed or  
8 non-foamed, and in blue, it has to be a mineral oil. It has to  
9 have a mineral oil gel composition.

10 So this, I think, is the critical part that isn't in our  
11 briefs per se -- the case certainly is -- that we would ask you  
12 to focus on because when you compare the two sets of claims and  
13 the differences that *Ohio Willow Wood* has, you'll see that  
14 saying World Wide Web for a distributed network or safety and  
15 scalability when they're already in the claims doesn't come  
16 even close to rising to this level, and this level in the Ohio  
17 claims was not good enough to avoid collateral estoppel.  
18 Federal Circuit -- the district court first and then the  
19 Federal Circuit applied collateral estoppel to the claims on  
20 the right.

21 In pink is another difference, which is that this gel  
22 composition has to reside only on the interior surface. There  
23 is no such requirement on the left.

24 So we have sort of reshuffling of the words in yellow and  
25 green, and we have substantive changes to the claims in purple,

1 orange, blue, and pink, and none of this was enough to avoid  
2 collateral estoppel in that claim -- in that case, I should  
3 say.

4 Let me now apply it to this case. So the first difference  
5 Mr. Verhoeven covered in detail. I won't repeat most of what  
6 he said, but the first difference is the World Wide Web, and,  
7 again, we see that that limitation is in the claims of the  
8 '985, so here on the screen -- and you'll see several slides  
9 like this, Your Honor -- I have the adjudicated claim on the  
10 left, like the *Ohio Willow Wood* original claim. It was  
11 invalidated in Texas, just like that case. On the right we  
12 have the comparative claim from the '507 patent, your claim 32.  
13 And again we have a distributed hypermedia network, and the  
14 only example in the patent is the web, and so we know that the  
15 genus species argument here also applies, and this is not a  
16 meaningful distinction or I would argue it's not a distinction  
17 at all between the two claims, and it's certainly not one as  
18 substantive as we saw in *Ohio Willow Wood*.

19 The HTML point comes here into play here, too. We have  
20 the HTML tags that modifies the embed text formats in claim 40.  
21 And so we point you to claim 42 in our papers as the right  
22 comparator for '985, and it is. That it absolutely -- I concur  
23 with everything Mr. Verhoeven said. That is a World Wide Web  
24 standard language, and it is an express reference to the web in  
25 the claims of the '985.

1           The specification here is the cite that Mr. Verhoeven  
2       didn't show you from the '507 and the '985. In the '507  
3       patent -- I'm on slide 6 here, column 1, line 56 through 61  
4       refers to HTML as an Internet standard, and it cites to the  
5       Berners-Lee paper, the seminal paper on the World Wide Web, for  
6       support for it. So we know when Eolas talks about HTML like it  
7       does in claim 42, it's talking about World Wide Web text, World  
8       Wide Web languages.

9           The prior art in the Texas case, the *Eolas I* case,  
10      included the embed tag that we talked about in our tutorial  
11      from Dr. Raggett. He was a -- he is now a professor but was  
12      working hand in hand with Dr. Berners-Lee on developing the web  
13      for the next web but before Eolas' work began. He had come up  
14      with this embed tag for the type attribute that would allow you  
15      to embed any kind of device -- any kind of app you wanted,  
16      including video.

17          And we see that the patent here, the '507 patent, takes  
18      that same HTML tag format, brings it into a table, and then  
19      claims it in claim 42. It is claiming the embed text format of  
20      the HTML embed.

21          So the modification to the patent itself was simply to add  
22      the web tag HTML embed. So no distinction at all there.

23          Back to the *Sovereign* case. Mr. Verhoeven cited it for  
24      obviousness-type double patenting, but it also applies equally  
25      to issue preclusion, and for the same point, which is the same

1 argument was made in that case as is made to Your Honor today:  
2 Well, no, the new claims, the unadjudicated claims talk about  
3 the Internet, and the old claims didn't. And the *Soverain*  
4 case, the Federal Circuit says that is simply not good enough.  
5 That while it's true that the claim -- the unadjudicated claim  
6 39 recites a hypertext statement in accordance with claim 15  
7 wherein the network is an Internet, that's just the routine  
8 incorporation of the Internet technology in claim 39, and it  
9 doesn't change the invalidity analysis. That's the question  
10 again we're facing from *Ohio Willow Wood*: Has this changed the  
11 question of validity by adding "World Wide Web"? *Soverain*  
12 *Software* tells us it actually doesn't, and that's for issue  
13 preclusion as well as obviousness-type double patenting.

14 Your Honor asked about the position we took under -- in  
15 the Texas case, and I have got a couple slides to show you  
16 that. Because I agree with you it's a distraction. I think it  
17 has absolutely nothing to do with the argument today, but I  
18 know my colleague at the bar, Mr. Campbell, is going to, quote,  
19 fundamentally disagree with. And the accusation is that me  
20 personally, I think, and Ms. Doan are talking out of both sides  
21 of our mouth today.

22 **THE COURT:** Well, hold on, hold on, hold on.

23 First of all, it's a distraction, so you actually don't  
24 have to talk about it if you don't want to.

25 Secondly, I feel that, just as I said earlier, that for

1 the plaintiffs, what happened at the PTO is a big part of their  
2 presentation. Your brief spends a lot of time talking about  
3 positions that the plaintiffs took regarding claim  
4 construction. So I don't know, you know -- I don't know that  
5 I -- I don't know that I care that much.

6 **MR. LUMISH:** All right. I'll do it quickly, Your  
7 Honor. We do talk about what they said because the point being  
8 that their patent has always been perceived by both sides as  
9 one that was a World Wide Web patent. And here you can see the  
10 argument we in fact make.

11 So I've got at the top of the screen Eolas' brief. And  
12 what they argued to the Court is that Amazon and Google, quote,  
13 "argued to the jury that the claims were not limited to the  
14 web." That is not at all what happened. And even their own  
15 quotation, which I have underscored in red here, doesn't say  
16 that.

17 So they cite to the trial transcript at page 64, and they  
18 quote -- and this is the best one they could muster -- "There's  
19 no requirement that the browser be a web browser." We  
20 absolutely made that argument, and it's true that claim 40,  
21 which only recites a browser and doesn't say HTML -- our  
22 position was that claim itself is not limited to the web. But  
23 when it came to claim 42, which says HTML, we always said that  
24 it required web-based -- or was web based and required  
25 web-based prior art.



1           The reason this dispute came up, just so you know, was  
2 because Eolas wanted to knock out a reference called  
3 "MediaView." MediaView was a -- had a browser. It was a  
4 document viewer and network system, but it wasn't a web-based  
5 system.

6           And so let me turn you to another one of their exhibits.  
7 This is Eolas' Exhibit 24. This is our claim construction  
8 brief in the underlying *Eolas I* case. And you'll see that we  
9 in fact took the opposite position to what they just argued.  
10 We didn't say that none of the claims cover web or HTML. We  
11 expressly noted that claim 42, which is our comparative claim  
12 today, limits the text formats to HTML, but because the other  
13 claims, like 40, didn't, claim differentiation would weigh  
14 heavily against the argument that the web browser in 40 had to  
15 be only a web browser and couldn't also be a broader document  
16 browser. So our position has been the same all along. 40 and  
17 its web browser isn't limited to a -- pardon me -- and its  
18 browser isn't limited to a web browser but would include one.  
19 Claim 42, which refers to HTML, is absolutely a web-based  
20 claim.

21           And we actually -- because of that, we argued to the jury  
22 that MediaView itself had to be combined with HTML and  
23 web-based art. We said and -- this is our expert testifying in  
24 the trial on cross-examination where he says that his opinion  
25 with respect to MediaView is one of obviousness because it

1 doesn't satisfy the HTML issues. This is slide 12, page 85,  
2 lines 6 through 19 of the trial transcript.

3 And so because of that, Dr. Phillips, our expert, combined  
4 it with web references, and here is one example of that, slide  
5 13, trial transcript at page 78, where he combines it with the  
6 CERN browser. CERN browser is Dr. --

7 **THE COURT:** Mr. Lumish --

8 **MR. LUMISH:** Yes, sir?

9 **THE COURT:** -- you're operating in your last few  
10 seconds before I turn it over to Mr. Campbell.

11 **MR. LUMISH:** All right, Your Honor. Let me go to the  
12 end then on -- I'll skip all the things you asked Mr. Verhoeven  
13 to skip. And I just wanted to end on the law for this point.  
14 And then I won't have time for Kessler, I guess --

15 **THE COURT:** No. I just -- I mean, we are past 3:00.  
16 Mr. Campbell hasn't talked yet.

17 **MR. LUMISH:** Understood.

18 I'm just trying to get to the slide quickly, Your Honor.  
19 I will just go to -- I will end on *Ohio Willow Wood*,  
20 Your Honor.

21 So we have the scalability argument and the security  
22 argument. We see in the evidence that those things are  
23 described equally in the '985 as they are in the '507, and even  
24 if that's not agreed, if there's some additional wording, I  
25 think you have to go back to this analysis, which is are any of

1 those things substantive changes that are even more different  
2 than the changes that were made in the *Ohio Willow Wood* case,  
3 and we think clearly the answer to that is no, and so the same  
4 results should occur here. Claims are invalid in Texas in that  
5 case and in this case. They should be found invalid here.

6 **THE COURT:** Thank you, Mr. Lumish.

7 **MR. LUMISH:** Thank you, Your Honor.

8 **THE COURT:** Mr. Campbell.

9 **MR. CAMPBELL:** Yes, Your Honor. Thank you,  
10 Your Honor.

11 Mr. Lumish, if you could stop -- there we go.

12 **THE COURT:** Mr. Campbell, I will say Mr. Lumish does a  
13 pretty catchy job with that *Ohio Willow Wood* case, so at some  
14 point in your presentation, you should tell me what you think  
15 your best collateral estoppel case is for your side.

16 **MR. CAMPBELL:** Sure, Your Honor. And I will be happy  
17 to start there.

18 Can I just verify you can see my slide on your screen?

19 **THE COURT:** I can see everything quite clearly, and  
20 it's not necessary that you start there. You can work it in  
21 wherever it's convenient.

22 **MR. CAMPBELL:** No. I want to make sure I address the  
23 Court's question, so I'm happy to, if that's a question the  
24 Court has, to start there.

25 I think it's very interesting that Mr. Lumish focuses on

1 *Ohio Willow Wood* because I think when the Court reads *Ohio*  
2 *Willow Wood*, you'll find that it's not -- it's not the way it  
3 was suggested here.

4 *Ohio Willow Wood* -- and I'll read from it -- the Federal  
5 Circuit says under *Ohio Willow Wood* -- and the collateral  
6 estoppel section is not that long. It's maybe a page. But the  
7 Federal Circuit says, "OWW, *Ohio Willow Wood*, seeks reversal on  
8 appeal by arguing that the mere existence of different claim  
9 language in the adjudicated claims of the '182 patent and the  
10 unadjudicated claims of the '237 patent is sufficient to  
11 overcome collateral estoppel. We disagree."

12 No argument there. Just different language doesn't get  
13 you there. And so that's the proposition that *Ohio Willow Wood*  
14 stands for.

15 And then the Court goes on to show the claims, as  
16 Mr. Lumish did, and in a paragraph say that, "Since *Ohio Willow*  
17 *Wood* failed to explain how the block copolymer limitation  
18 changes the invalidity analysis, *Ohio Willow Wood* has not met  
19 its burden of opposing summary judgment based on this  
20 distinction."

21 So what we have with *Ohio Willow Wood* is just a difference  
22 in claim language doesn't get you there. No disagreement. Of  
23 course that's the case. But you've got to look at the  
24 differences and whether they affect the invalidity analysis.  
25 *Ohio Willow Wood* made no arguments or at least failed to

1 explain, as the Federal Circuit says, how that affects the  
2 invalidity analysis. That is not what we have here.

3 And I think if the Court reads particularly Dr. Martin's  
4 declaration that is Exhibit 1 where he walks through all the  
5 differences and how those differences impact the analysis here,  
6 we'll see that that -- that standard is not what we're looking  
7 for here -- is not what's going on here. In fact, what's going  
8 on here is we have a lot of differences.

9 **THE COURT:** Mr. Campbell, I appreciate that. My  
10 question was what's a good case -- what's a good case for you,  
11 and maybe you'll get to that later.

12 **MR. CAMPBELL:** Well --

13 **THE COURT:** Maybe you think *Willow Wood* is a good case  
14 for you, but it came out the other way, maybe for different  
15 reasons. I heard what you said, but I'm just saying --

16 **MR. CAMPBELL:** I think -- sorry.

17 **THE COURT:** Yeah. No. But if you think there's a  
18 different case that's good for you, it would be good to know  
19 that. That's all.

20 **MR. CAMPBELL:** No. I think *Ohio Willow Wood* -- I'll  
21 think about it and have my colleagues look for if there is a  
22 better case that I should point the Court to, but I think *Ohio*  
23 *Willow Wood* is a very good case for us in that it says what you  
24 do is you look at the limitations and look at how do those  
25 different -- those different -- that different language -- how

1 does it affect the invalidity analysis, and then when you take  
2 our brief and you take the evidence, Dr. Martin's declaration  
3 in Exhibit 1 and particularly compare that to Dr. Turnbull's,  
4 you see that *Ohio Willow Wood* supports that collateral estoppel  
5 can't apply in this case because the analysis is changed based  
6 on the limitations. So I think *Ohio Willow Wood* is a very good  
7 case for us.

8 **THE COURT:** Very good.

9 **MR. CAMPBELL:** Okay. So in my time -- and I can jump  
10 off from there, and I'll do a little overview here, but I'll  
11 jump right into it -- I want to talk about the inventors' work  
12 leading to the '507 patent, those differences, and then  
13 obviousness-type double patenting, and collateral estoppel and  
14 Kessler.

15 And there's a reason, particularly as we just talked about  
16 with the differences, why I want to talk just very briefly  
17 about the inventors' work at UCSF, and that's because the  
18 timing matters. And my opposing counsel didn't talk about this  
19 at all, and, in fact, some of the statements were just classic  
20 Federal Circuit hindsight. You know, *why would -- why would*  
21 *this -- well, of course this was obvious. The inventors did*  
22 *it.* Well, that is -- that is just the paradigm of hindsight to  
23 say that.

24 We have to look at the time, and it's -- it's hard now  
25 because we're in 2020, but we have to go back to 1993 and say

1 was -- was the differences in this claim, the material  
2 differences in this claim, obvious based on the prior claims.  
3 And they're absolutely not.

4 At this time, Dr. Doyle, David Martin, an inventor, who is  
5 different than David Martin, our expert -- two different  
6 people, unrelated -- and Cheong Ang worked at the Center for  
7 Knowledge Management at UCSF, and their tasks in 1993 was to  
8 develop new technologies to disseminate the results of human  
9 embryo biomedical research. And the problem was that user  
10 computers, even today, but particularly in 1993, and some  
11 servers were unable to process and store the required data.  
12 The networks were not programmed for interactivity. And  
13 Dr. Doyle's declaration, which is not long but is very  
14 enlightening in terms of the problems they were dealing with of  
15 the massive amounts of data and what they were tasked to do, is  
16 very interesting, and that's at Exhibit 52 to our brief.

17 But what they wanted to do was to try to allow users to  
18 harness powerful remote computers, and even if one server  
19 couldn't do it, do it with multiple computers. And so they  
20 created a program, and it was a modification of Mosaic, so that  
21 non-technical, at least non-computer technical researchers --  
22 obviously very technical in their field -- could access and  
23 interact with these 3D images that were stored and processed on  
24 multiple servers.

25 And so from that in 1994 is when they filed their first

1 patent. And in 1995 is when Dr. Doyle formed Eolas, and the  
2 University of California granted the exclusive license under  
3 their mission to -- and their policies to encourage inventors  
4 to -- entrepreneurial efforts to take patents out into the  
5 world.

6 So for this patent, it was filed in 2011, but that's not  
7 the time, as the case law tells us, to look at these claims.  
8 The time to look at it is 1993 and 1994.

9 We had expedited examination requested and granted. The  
10 examiner, which we're going to talk about, Mr. Donaghue, was  
11 actually the examiner on all the continuation applications, so  
12 this issue was not new to him. The first office action was in  
13 May 2015. It issued in November.

14 So as I mentioned -- and the Court asked about this -- and  
15 of course the Court fulfills a critically important role and --  
16 and sometimes patents get through the Patent Office and the  
17 court finds them invalid for obviousness-type double patenting.  
18 I think the prosecution history here, though, is important  
19 because it shows this is not a case where the Patent Office  
20 didn't think about it, wasn't diligent in applying it, didn't  
21 consider it. In fact, what we have is in the '985 patent,  
22 there was an obviousness-type double patenting rejection and a  
23 terminal disclaimer over the '906. Same thing in the '662  
24 patent. Same thing in the '293 patent.

25 In this patent, the examiner, the examiner Donaghue who



1 was on all these continuations, called the prosecuting attorney  
2 and said, "Tell me how this is different than the art that  
3 invalidated the prior claims in the prior case. How is this  
4 going to be different than those claims?" And that's when  
5 Eolas submitted what's at Exhibit 43, an explanation of how  
6 these claims are different and focused on much of what we're  
7 talking about today.

8 And after receiving that and some other examiner  
9 amendments to work out some language and -- and get to the  
10 final claims, the examiner allowed this patent, with no  
11 obviousness-type double patenting rejection.

12 **THE COURT:** What weight do I give this?

13 **MR. CAMPBELL:** I'm sorry?

14 **THE COURT:** I'm sure you treat this in your briefs,  
15 but I'm not remembering it at this moment. What weight do I  
16 give this? Let's say I were writing an order and it came out  
17 your way, and I recited this history as you have, and I said,  
18 "Because of this of history, which shows careful consideration  
19 by the PTO, I am allowed to give that X weight." What would I  
20 say for X and what would I cite as authority?

21 **MR. CAMPBELL:** Well, I don't think you would say  
22 anything for X beyond what is already in obviousness-type  
23 double patenting, which is the burden is on the defendants by  
24 clear and convincing evidence.

25 **THE COURT:** But you start with that. But that would

1 be true even if you didn't say anything about the --

2 **MR. CAMPBELL:** That's right. That's right. Which is  
3 why I say I don't think you can do anything with X. That's the  
4 burden. That's what you start with. And so while maybe X  
5 isn't quantifiable in the sense that clear and convincing  
6 evidence is quantifiable -- I don't know that it is --

7 **THE COURT:** I read your brief carefully on this point,  
8 as I tried to indicate to Mr. Verhoeven, so I think I got it.

9 **MR. CAMPBELL:** Okay.

10 **THE COURT:** Mr. Donaghue, if it is a "mister" -- it  
11 might be Ms. --

12 **MR. CAMPBELL:** It's mister.

13 **THE COURT:** Mr. Donaghue gave this, and he knew the  
14 whole history and all that. I got that.

15 **MR. CAMPBELL:** Yeah. And Judge Rich says that when  
16 the evidence is not before the Patent Office, that's something  
17 for the court to consider, and when the evidence is, that's  
18 something for the court to consider.

19 Now, Judge Rich doesn't put it -- put X into words or  
20 percentages, but it's something for -- it's something for the  
21 Court to consider. And I think Judge Rich is right there.

22 **THE COURT:** Okay. That's helpful. That's a good  
23 answer to my question.

24 **MR. CAMPBELL:** And so that -- we're at the current  
25 litigation. I'll skip over this quickly, but, you know, Eolas

1 sought early resolution on these legal issues four years ago.  
2 We're glad we're finally -- we're finally getting to these.

3 So I've got this up for claim 45. In Dr. Martin's  
4 declaration at pages 39 through 46, he provides similar ones  
5 for all the asserted claims. It highlights the language that  
6 is different.

7 As we've already talked with, *Ohio Willow Wood*, just  
8 different language doesn't get you there, but you need  
9 different language. You've got to have different language to  
10 start with. If you don't have different language, you're  
11 certainly not going to get there. And then you can look at how  
12 the differences matter.

13 One thing that I think is critical -- and defendant's  
14 don't do and Dr. Turnbull doesn't do at all -- is you really  
15 can't isolate these differences and take them one by one.  
16 That's not, as the Court -- that's not how a patent claim  
17 works.

18 The differences in the claims can't be considered in  
19 isolation. They must be considered as a whole. Just like in a  
20 103 analysis, so, too, under obviousness-type double patenting  
21 you have to consider as a whole a prior patent claim against a  
22 claim in the existing patent and determine whether it is  
23 invalid under clear and convincing evidence for  
24 obviousness-type double patenting. And there is simply no  
25 evidence in the record, other than Dr. Martin's uncontroverted

1 evidence, that as a whole, there are certainly meaningful  
2 differences.

3 So those -- the combination of those differences is -- was  
4 briefly -- well, extensively alluded to in terms of, number  
5 one, the web is the network and then touched on briefly,  
6 although there's not a whole lot for me to respond to, security  
7 and scalability are the differences as a whole that we need to  
8 look at.

9 And --

10 **THE COURT:** Well, I think that -- I think -- there is  
11 not a lot to respond to because I asked your opponents to keep  
12 their powder dry so that you could address this fulsomely and  
13 they could decide whether they needed to respond --

14 **MR. CAMPBELL:** Okay. Well --

15 **THE COURT:** And their brief is emphatic that, as  
16 Mr. Verhoeven said I think summarily -- that the questions of  
17 scalability and security simply are not in the prior -- they're  
18 not in the patent language.

19 **MR. CAMPBELL:** Well, the -- that word -- and we tried  
20 to help and label the -- the combined language is "security" --  
21 isn't -- although we did explain to even the PTO that that  
22 language provides a security mechanism, we can change it from  
23 "security" to "configured with interactive applications." It  
24 doesn't -- the label is not what matters. Okay? The  
25 description that the inventors gave in trials and our briefs

1 isn't what matters. What matters is the claim language.

2 So we can take away the "security" label and focus on the  
3 claim language. It's different -- meaningfully different claim  
4 language that is not obvious in light of the prior claims.

5 Scalability relates to the distribution, the coordination,  
6 the viewing transforms. It's a whole group of differences in  
7 the claims, and we can look at that claim language as well.  
8 The label is -- is unimportant other than to allow us to all  
9 talk -- know what we're talking about.

10 And we're going to talk about not only is there no  
11 evidence on -- considering the claims as a whole, there is no  
12 evidence on motivation and no evidence on secondary  
13 considerations, which are absolutely part of the  
14 obviousness-type double patenting analysis.

15 So let's start with that first difference, which is the  
16 web-related limitations, and, again, we're in 1993. Okay?  
17 We're in 1993. These claims require web servers, web browsers,  
18 web pages. Okay? The prior claims required a distributed  
19 hypermedia network. And those differences are material because  
20 of the technology in 1993, and those differences are shown in  
21 the defendant's own arguments as showing those differences were  
22 material in their prior discussions to the Court about the  
23 claims.

24 **THE COURT:** Well, here's something that Mr. Verhoeven  
25 said that I had not -- I don't know why I didn't focus on this

1 after reading the briefs. Could you go back a slide?

2 **MR. CAMPBELL:** Sure. Is it not -- let's see. There  
3 we go.

4 **THE COURT:** Okay.

5 So prior claims are not limited to the web. It's sort of  
6 like the prior claims are about jungle cats, and the new claims  
7 are about panthers. Well, panthers are covered by the prior  
8 claims, so why is this middle point here helpful to you?

9 **MR. CAMPBELL:** Well, first of all, let me respond to  
10 that on a legal ground, legal point, and then a factual point.

11 As the Northern District of California stated in the  
12 *Medtronic vs. AGA Medical Corp.* case, the commonplace situation  
13 where a broader claim embraces or encompasses the subject  
14 matter defined by a narrower claim, however, is not per se  
15 double patenting. So just because we have that situation  
16 doesn't make it double patenting.

17 So then that gets to the factual point --

18 **THE COURT:** Well, it's not per se double patenting.

19 **MR. CAMPBELL:** Right.

20 **THE COURT:** But my question is why is this middle  
21 point helpful to you?

22 **MR. CAMPBELL:** Getting there.

23 So that gets to the factual point; right? Place yourself  
24 in 1993. Okay? And Dr. Martin talks about this extensively,  
25 particularly in paragraphs 37 to 38. But a distributed

1 hypermedia network might be an internal network that you have  
2 that you've built up that has particular speed, particular  
3 processing power, the ability to do things. Okay?

4 In 1993, the web didn't have that; right? Your Honor  
5 maybe remembers, you know, much -- I certainly do, even way  
6 after 1993, watching images come over line by line. Right?  
7 Because the speeds were so slow on a 144 modem. Okay?

8 To think the web at that time was going to support  
9 interactive applications doing the data sizes and processing  
10 that was required for this human embryo project was -- was very  
11 different, was a -- very different than saying do it in a  
12 distributed hypermedia network.

13 **THE COURT:** Your opponents point to the HTML and HTTP  
14 references in the prior patent which would seem to contemplate  
15 that the patent would be practiced with regard to the web.  
16 And --

17 **MR. CAMPBELL:** Yes. So -- sorry.

18 **THE COURT:** What about that?

19 **MR. CAMPBELL:** Okay. So two points on that.

20 First, the -- you can't use the spec. Of course the  
21 claims are supported by the spec, but as again the Northern  
22 District of California said in *Regency of University of*  
23 *California vs Monsanto*, the Court cannot rely on the earlier  
24 patent's specification as prior art in evaluating double  
25 patenting.

1           So, yes, the specification discloses using the web as a  
2 distributed hypermedia network. It supports the claims. If it  
3 didn't, we would have a significant 112 problem. Okay?

4           HTML is certainly used on the web, and if I try to do the  
5 analogy like Your Honor just did, I'll probably mess it up, but  
6 just because the web uses HTML does not make all things that  
7 use HTML the web. And, in fact, as Dr. Martin points out in  
8 his declaration -- and the history of HTML was not quite  
9 characterized accurately -- HTML is a variation of SGML. It's  
10 the Standardized General Markup Language.

11           You can have plenty of non-web browsers that can read and  
12 understand and open something based on HTML. Just because you  
13 use HTML, non-web browsers -- Dr. Martin talks about a system  
14 that uses HTML that no one of ordinary skill in the art would  
15 consider the web -- doesn't make it the Web.

16           So when you try to use the spec to say the claims are  
17 invalid, well, if you're able to do that, every continuation  
18 patent would be either invalid for obviousness-type double  
19 patenting or invalid for lack of 112 support. That doesn't  
20 work. And you can't use HTML --

21           **THE COURT:** Mr. Campbell, I have not heard any  
22 complaint from our court reporter, but nonetheless, if you  
23 could --

24           **MR. CAMPBELL:** I'm going too fast.

25           **THE COURT:** -- slow down just a tad, that would be



1 good. You will be happy with your transcript if you do that.

2 **MR. CAMPBELL:** I apologize, Your Honor. I'm wanting  
3 to make sure I cover everything since there was a lot in the  
4 prior art.

5 **THE COURT:** I'm ready whenever you are. Go ahead.

6 **MR. CAMPBELL:** So, Your Honor -- let me make sure I  
7 slow down.

8 The web, as we talked about, was in its infancy in 1993,  
9 1994. Your Honor may be familiar with the *Today Show* video.  
10 Dr. Doyle was going to show it six weeks ago at the technology  
11 tutorial where the cohosts were asking, much after this, "What  
12 is the internet? What does the @ sign mean?" It's not like it  
13 was today.

14 And what the web designers at that time envisioned was  
15 that you would have external helper applications for images and  
16 video, things that the inventors were inventing and trying to  
17 come up with today to do through the web. They rejected  
18 supporting anything more than static text and static images.  
19 So at that time, this -- the web posed unique challenges.

20 Another example, just to reset ourselves into the time  
21 frame, is Microsoft. We all recognize now World Wide Web  
22 leader, came out with Internet Explorer. This is their web  
23 page in 1994. Basic static blue text -- static image, blue  
24 underlined links, nothing that would suggest you could do what  
25 the inventors were trying to do at that time.

1           And then the Netscape -- one of the creators of Netscape,  
2           Mr. Andreessen, in '93 was saying that having inline images  
3           located on servers are bad enough. If we start making generic  
4           inclusions, which Dr. Martin explains is, you know, interactive  
5           type -- other type content available, things are going to get  
6           harried. He says things you like audio and MPEG can simply be  
7           pointed to from an anchor, a link, as Mosaic does and forked to  
8           external viewers. So they had no interest in doing the type of  
9           thing that the inventors were doing, because it wasn't obvious,  
10          and that shows. It wasn't obvious to do it at that time.

11          Secondary considerations are important. Here, again, this  
12          shows praise for doing this on the World Wide Web. It wasn't  
13          obvious at the time.

14                 **THE COURT:** Mr. Campbell --

15                 **MR. CAMPBELL:** Yes, sir?

16                 **THE COURT:** This question may reveal a great deal of  
17          ignorance on my part, but isn't the question -- but is the  
18          question whether that technology was obvious at that time or  
19          whether -- I can never keep the numbers straight in my head --  
20          or whether the invention disclosed in the most recent patent is  
21          obvious in light of your prior patents?

22                 **MR. CAMPBELL:** It's both. It's -- and not the  
23          patents. Is the current claims obvious in light of the prior  
24          claims in 1993 as of the priority date? When you look at *UCB*  
25          that we cite in our briefs --

1           **THE COURT:** I see what you're saying. Okay. Very  
2 good.

3           **MR. CAMPBELL:** You still have to have a time frame,  
4 and *UCB* and *Otsuka* say it's as of the priority date.

5           **THE COURT:** Right. Okay. I got that.

6           **MR. CAMPBELL:** Okay. So Mr. Andreessen was working at  
7 NCSA, the National Center for Supercomputing Applications.  
8 Later the associate director worked with Dr. Doyle because  
9 after seeing the project that they were working on to  
10 disseminate these embryos, they wanted to collaborate with them  
11 to work on -- to work with this invention. So, you know, it  
12 shows again it wasn't obvious at the time to the people  
13 creating the Netscape browser.

14           And then a lot of the inventors' art teaches away from the  
15 claimed invention. The Viola art, which is talked about, used  
16 different technology. It was unsuitable for the web because  
17 what they were trying to do -- what Viola was trying to do  
18 wouldn't work on the web.

19           Mosaic -- the inventors modified Mosaic to make this work.  
20 And then the art they point to in their brief, LBNL and Digital  
21 Anatomist, those were virtual dissecting programs, but they  
22 were CGI solutions. They refreshed a whole page so, again,  
23 pointed away from having the web do interactive content.

24           And, again, this is where -- and this was talked about a  
25 little bit with opposing counsel, but the defendants were not

1 pointing to the way they characterize inventions in the prior  
2 case or other things but the way they characterized the claims.  
3 And on the eve of the last trial, they wanted a claim  
4 construction that a browser application is not limited to a web  
5 browser application because they were concerned that then their  
6 non-web browser art wouldn't render the claims obvious if it  
7 was limited to web browsers.

8 So applying that here, you can't now say non-web browser  
9 claims, non-web browser art, does render it obvious. It's the  
10 exact opposite situation that they contended before, and Judge  
11 Davis agreed with them on the eve of trial and said that the  
12 browser application was not limited to the web but was broader  
13 than that.

14 And then of course the defendants leveraged that in the  
15 trial and focused on the fact that there's no requirement that  
16 the browser be a web browser. That's different. Those are  
17 different things, not just different language. Different  
18 things. That's what they told the jury before.

19 Okay. So I can move to the second point. Again, the  
20 label we use is "security-related limitations" but, you know,  
21 let's recognize that's a label that is for the claim language  
22 that you see here on the screen, which this or something very  
23 close to it is in all of the asserted claims, independent  
24 claims 19, 32, and 45 -- is that you have to have a web server  
25 in communication with a World Wide Web browser on a client

1 computer connected to the World Wide Web distributed hypermedia  
2 network that has been configured with a plurality of different  
3 interactive content applications. That is different than the  
4 prior claims and different than the prior art.

5 And that -- well, before I jump to the next slide, that --  
6 when you want to focus on the language -- again, Dr. Martin  
7 talks about it in his declaration at paragraphs 47 to 48 and  
8 explains how that's different because -- and Dr. Doyle spends a  
9 lot of time in Exhibit 52 talking about this. We call it  
10 "security." It doesn't matter. You can use the language. But  
11 this gives the user control because the user now has control as  
12 to whether they're going to allow their web browser to be  
13 configured with a particular interactive content application or  
14 not.

15 And Dr. Martin in his declaration shows an example of that  
16 where you can go into your web browser today and say, "I'm  
17 going to disable Flash. For some reason, I don't trust Flash.  
18 I don't trust Adobe," for whatever reason you might have. "But  
19 I'm going to allow JavaScript. I'm good with that." Right?

20 Well, now if a web server tries to send you Flash, your  
21 browser is not going to handle it. You've taken control of  
22 that, and you've got the security of knowing you -- that won't  
23 run because you said, "No, I don't want that. I don't trust  
24 that." JavaScript comes across. It can now select the  
25 application for JavaScript, and it can run. You trusted that.

1 You're good with that.

2 Again, we can go back to the prior litigation and focusing  
3 on what people said about the claims and what the prior art  
4 teaches. That was an issue, and that was an issue with some of  
5 the prior art, and it was noted that that prior art -- even the  
6 inventor of that prior art said it has lots of possibilities,  
7 but there's a security issue. "We can use it for demos, but we  
8 won't release it unless we figure out some kind of security  
9 mechanism."

10 And Dr. Doyle, in Exhibit 52, explains that's a difference  
11 of the prior art that was used to invalidate the prior claims  
12 and these claims. And that the security vulnerability is  
13 prevented by making the web browser -- and the user has control  
14 of that web browser -- the final arbiter of what interactive  
15 content application is launched rather than the web page.

16 **THE COURT:** Is there anything in -- is there anything  
17 in the specification -- I don't know that it would be an  
18 embodiment, but is there anything that says the reason -- in  
19 the patent itself -- the reason somebody would select or not  
20 select an interactive content application is to be more secure?

21 **MR. CAMPBELL:** It doesn't say that in the  
22 specification. We did talk about that in the prosecution  
23 history when -- with the examiner of how these claims were  
24 different, and that's at Docket 609-11 at page 61. It's part  
25 of Exhibit 43. That was discussed as to why this claimed

1 embodiment provides this advantage over other claimed  
2 embodiments.

3 **THE COURT:** Could you give me that page number again,  
4 Mr. Campbell?

5 **MR. CAMPBELL:** Certainly. It's Docket 609-11, and  
6 it's page 61 of that -- of the docket.

7 **THE COURT:** Very good.

8 **MR. CAMPBELL:** So at the top, page 61. So it is part  
9 of the intrinsic record.

10 And so as Dr. Doyle explains, in these claims, in the '507  
11 patent claims, "The browser is configured with a plurality of  
12 interactive content applications before the information is  
13 received from the web server that is used then to cause the  
14 selection and subsequent launch of the appropriate interactive  
15 content application. This enables protection of the user by  
16 ensuring only safe and trusted interactive content applications  
17 can be called for by web pages."

18 Again, focusing on what the defendants said about the  
19 claims in the prior case, because that's what we're comparing,  
20 claims, they asked their expert, "Is there any security  
21 limitation in any of the asserted claims?" "No, there is no  
22 security issues at all with the associated claims."

23 So we could take away the label, but their experts say no  
24 security issues at all with the associated claims. Clearly  
25 requiring the web browser to be configured with and the user

1 control to control what applications are -- the web browser is  
2 configured with is a security limitation. That's what it is.  
3 We can talk about it as the "configured with" limitation.

4 And then they leverage that in the -- in their closing.  
5 They say there is no security requirement that has to be highly  
6 secure. There is nothing that says it can't use Mr. Wei's  
7 HMML. So they're saying it's like the prior art in that it's  
8 got a security problem. These claims, the uncontroverted  
9 expert declarations from Dr. Martin and Dr. Doyle, refute that  
10 that would -- that Mr. Wei's HMML -- these claims don't have  
11 that problem.

12 Okay. Scalability-related limitations. Again, label.  
13 The important thing is, of course, the claim language. The  
14 claim language specifically talks about coordination, and we're  
15 looking at claims 24, 37, and in particular, 45.

16 The claims also talk about breaking up tasks and  
17 performing viewing transformations on the server side as  
18 opposed to the client side, which again helps with the  
19 scalability.

20 All of that is unlike the prior art and unlike the prior  
21 claims.

22 **THE COURT:** If I were to ask you a similar question  
23 about scalability that I just asked about security, what would  
24 you say?

25 **MR. CAMPBELL:** That is in the spec -- that is in the



1 specification. And I will -- I will find -- let's see. Did I  
2 put it in the notes here? Yes, I did.

3 Well, yeah. That's right. Okay. So in column 11, lines  
4 23 to 25 is one example. I believe there is another, but this  
5 is one right at the tip of my fingertips. It says, "In a  
6 preferred embodiment, distributed processing is coordinated by  
7 a program called VIS represented by application client 210 in  
8 Figure 6." So there is a discussion of the coordination  
9 program VIS in the specification, and that's what we see here.  
10 I used Figure 10 because it's labeled VIS there, but we see VIS  
11 as the coordination computer coordinating with, below it, the  
12 VR servers that have -- that are the servers actually  
13 performing the tasks, and VIS can distribute that processing to  
14 coordinate that.

15 **THE COURT:** I suspect that if you and I had a lengthy  
16 conversation, we would conclude that we had different  
17 definitions of "scalability," but I don't know that we want to  
18 use up your time having that conversation now.

19 **MR. CAMPBELL:** Okay. I'd be happy to address that if  
20 Your Honor --

21 **THE COURT:** Well, I'm just wondering what is it about  
22 this patent -- about the invention claimed by this patent that  
23 makes it easier for people to do things in larger -- across a  
24 larger number of units of things doing that thing than would  
25 have been the case without that patent? I didn't say that very

1 artfully, but that's -- that -- that's sort of roughly my idea  
2 of scalability.

3 So if someone says, "Well, we have this" -- for example,  
4 "we have this program for project planning, and it's great, but  
5 it really only works for teams of 20 or fewer, that's it, and  
6 it only -- so that's it." Someone says, "Well, that's really  
7 too bad because I have an organization of 500 people, and we're  
8 not" -- you know, "we're not building accounting software for  
9 mom and pops, we're building airplanes, so I need something  
10 that applies that process but to much greater numbers, across  
11 many more units."

12 That is probably not a great example, but hopefully it  
13 conveys something of my idea of what scalability is.

14 **MR. CAMPBELL:** So let me try to address it, and if I'm  
15 off track to Your Honor's question, please interrupt me.

16 But I think where we might differ in scalability is we're  
17 talking about the server side, not the client side.

18 **THE COURT:** Okay.

19 **MR. CAMPBELL:** So rather than using, if I could, the  
20 example you just used, I can use what Dr. Doyle talks about in  
21 his declaration of we've got these massive visual embryo -- 3D  
22 embryo sets, and even one server has trouble processing the  
23 visualization that a user wants. And so it's going to be very  
24 difficult to get this out there to even a user with -- with a  
25 server because of the -- the massive amount of data that

1 Dr. Doyle talks about in his declaration that is required here.

2 So we have to break those up into different servers, the  
3 VR servers here, to be able to do that processing, and VIS is  
4 the coordination computer that sits in there and allows you to  
5 do that. And that is -- sorry.

6 **THE COURT:** Would you like to know what the Merriam  
7 Webster definition of "scalability" is?

8 **MR. CAMPBELL:** Sure.

9 **THE COURT:** "Capable of being easily expanded or  
10 upgraded on demand," and the example they actually give is a  
11 scalable computer network, and that definition is so squishy,  
12 really, you or I could have a field day with that so I don't  
13 think that really probably solves my --

14 **MR. CAMPBELL:** Well, it's Websters. It's very  
15 general. Of course, Websters is going to be very general.

16 But I think we can see here in Figure 10 what was being  
17 talked about in the specification. Right? That's why we  
18 labeled it "scalability," but it's the coordination computer  
19 VIS coordinating among these VR servers, and that's why we call  
20 it "scalability" because now I can scale out the servers so  
21 that I have the ability to handle more and more data, more and  
22 more processing. I can do that across a bigger network to  
23 serve, you know, whatever -- whatever number -- one client,  
24 maybe 500 clients.

25 And as Dr. Martin talks about -- this is in his

1 declaration at paragraph 76 -- this is where, you know -- I  
2 think this is one -- this is one of the places that -- that --  
3 where Dr. Martin shows -- Dr. Turnbull, you know, about nine  
4 times in his declaration says, "Well, if there is language" --  
5 "if it's not covering exactly the same thing, it's inherently,"  
6 and kind of "inherently" is kind of a magic word you can look  
7 for because it shows up nine times. He tries to say, "Well,  
8 it's the same type of thing."

9 And as Dr. Martin points out, he disagrees with that every  
10 time he uses the "inherently," that those are the same thing.  
11 And if they were the same thing, you would see -- and in the  
12 art -- even if it wasn't prior art, at least some time around  
13 there you would see this if it was obvious. And yet  
14 Dr. Turnbull -- the defendants used to have Dr. Mowry,  
15 Dr. Keller -- they've -- none of them have been able to point  
16 to any non-web examples or projects that use the -- that had  
17 the scalability the '507 patent teaches because that is -- that  
18 was not an obvious variation at the time.

19 Okay. So we've talked about the three buckets of  
20 differences. And then as -- as the Court knows, there's a  
21 two-step analysis. Identify those -- determine those  
22 differences, which we now have. They're much more than just  
23 different claim language. And then determine whether the  
24 differences render the claims as a whole patentably distinct  
25 compared to the earlier-issued claims. And given that there is

1 these three very different aspects of the current claims that  
2 are not in the prior claims, when you look as a whole, they  
3 cannot be obvious -- they cannot be invalid for  
4 obviousness-type double patenting, which is why the examiner  
5 very in tune to this asked about this, was explained this, and  
6 didn't issue an obviousness-type double patenting rejection,  
7 which would have been -- which would have just required, as in  
8 the other patents, a terminal disclaimer.

9 The burden is on the challenger to prove all the elements  
10 of obviousness-type double patenting by clear and convincing  
11 evidence. There is plenty of case law that says conclusory  
12 statements like just saying, "well, it's inherently there" or  
13 "one of skill" -- "it would have been obvious to one of skill"  
14 doesn't meet that clear and convincing evidence burden, and  
15 that is just lacking here.

16 Again, you can't mix and match claims either so you have  
17 to do a whole claim to a whole claim, and there is plenty of  
18 discussion about that in the case law as well.

19 I already talked about this, about considering the claims  
20 as a whole, so I'll jump over that slide and go here to where  
21 this was talked about a little bit, but the law is the  
22 opposite. The defendant's don't perform an obviousness-type  
23 double patenting -- a proper obviousness-type double patenting  
24 examination.

25 We talked about the claims as a whole. Let's talk about

1 the motivation to modify and the secondary considerations.

2 This is the "considered as a whole." I've talked about  
3 this, so I'll skip over that. This is the examiner's analysis,  
4 so I'll skip over that. And let me get to here.

5 And this was talked about, the *Geneva Pharmaceuticals*  
6 case, and this is in the defendant's brief that, "Eolas'  
7 attempt to resort to secondary fact-intensive considerations of  
8 obviousness is misplaced." And the *Geneva Pharmaceutical* case  
9 is cited and talked about before with the, quote, "obviousness  
10 requires inquiry into motivation to modify prior art.  
11 Non-statutory double patenting does not." Okay?

12 If you go to the Federal Circuit's opinion in *Otsuka* years  
13 after *Geneva Pharmaceuticals* -- and we pointed this out in our  
14 response brief. It wasn't new. Reading *Geneva Pharmaceuticals*  
15 to say obviousness-type double patenting doesn't require a look  
16 into the motivation and doesn't require a look into secondary  
17 considerations mischaracterizes those cases. And what the trap  
18 is that some practitioners fall into is it's often talked about  
19 as obviousness-type double patenting. The Federal Circuit in  
20 *Geneva* was talking more -- talked in terms of non-statutory  
21 double patenting.

22 Non-statutory double patenting, when I label it that way,  
23 can encompass both anticipatory non-statutory double patenting  
24 and obviousness-type double patenting. So in *Otsuka* what the  
25 Federal Circuit said is that contrary to the defendant's

1 arguments there, same as here, neither *Geneva* -- and some  
2 people cite *Procter & Gamble* -- stands for the proposition that  
3 in considering whether one compound is an obvious variant over  
4 another for purposes of non-statutory double patenting,  
5 analyzing the compound of the prior claim for a reason or  
6 motivation to modify is irrelevant. They say that's wrong.  
7 "Rather, an analysis of non-statutory obviousness-type double  
8 patenting like an analysis under Section 103 entails  
9 determining, among other things, whether one of skill in the  
10 art would have had reason or motivation to modify the earlier  
11 claimed compound to make the compound of the asserted claim  
12 with a reasonable expectation of success." And the quote  
13 here -- but when you read *Otsuka*, what *Otsuka* -- the Federal  
14 Circuit says is the mistake is *Geneva* was focused on  
15 anticipatory non-statutory double patenting. And of course as  
16 we all know, in an anticipation analysis, you don't look at a  
17 motivation to modify. You don't look at secondary  
18 considerations. That's an obviousness inquiry. But in an  
19 obviousness-type non-statutory double patenting, you still look  
20 for those just like in Section 103.

21 So *Otsuka* has said that reading of *Geneva Pharmaceuticals*  
22 or *Procter & Gamble* is wrong. And because of that, there is no  
23 evidence in the record of any sort of motivation to modify the  
24 prior claims to make these changes, to make these claims, and  
25 there is no evidence of the secondary considerations in the

1 evidence -- in the record.

2 And the secondary considerations here also support  
3 non-obvious. We talked about how browser designers like Marc  
4 Andreessen rejected interactivity on the Web. We talked about  
5 other people failing, such as Pei Wei and the ViolaWWW security  
6 flaw. We talked about the praise where the NCSA Mosaic team  
7 wanted to collaborate with Dr. Doyle's team given what they saw  
8 about the virtual embryo project.

9 And just as further evidence that secondary considerations  
10 need to be looked at, in *Otsuka* the Court found that the claims  
11 were not invalid for non-obviousness-type double patenting, but  
12 they said that the -- that that meant that they don't need to  
13 examine the evidence of secondary considerations of  
14 non-obviousness. Obviously if secondary considerations of  
15 non-obviousness didn't apply, they would have said, "That's not  
16 part of the test. We don't have to look at that." But they  
17 said, "We don't have to examine it because we're finding the  
18 patents are not invalid."

19 There is a similar quote in the *UCB* case that we cite that  
20 they do not need to reach the district courts' findings  
21 regarding secondary considerations. So these are very relevant  
22 and required aspects of the test that there is no evidence,  
23 other than Dr. Martin and Dr. Doyle's declarations talking  
24 about.

25 So if there is no questions on obviousness-type double



1 patenting, I'll turn to collateral estoppel.

2 **THE COURT:** Go ahead.

3 **MR. CAMPBELL:** So collateral estoppel -- just so --  
4 I'm told that -- well, we cited to *Bourns*. The Court was  
5 looking for another collateral estoppel case. *Bourns* is a good  
6 collateral estoppel case, which, again, it -- it's interesting  
7 collateral estoppel. The '507 claims of course were not  
8 adjudicated before here. The test is whether they are  
9 materially different than the prior claims.

10 Collateral estoppel is -- when obviousness-type double  
11 patenting fails, collateral estoppel fails, too. The  
12 differences because of why obviousness-type double patenting  
13 fail are the same differences of why collateral estoppel fails.

14 **THE COURT:** Yes. I agree with that. I agree with  
15 that.

16 **MR. CAMPBELL:** And that's what *Bourns* says. And the  
17 difference is they are just like obviousness-type double  
18 patenting. *Bourns* says the differences revealed by comparisons  
19 must be evaluated not in terms of obviousness under a domino  
20 approach, but rather in terms of the *Graham* issues, 103. So,  
21 again, as a whole. It's going to be very, very much the same.

22 Here collateral estoppel under Fifth Circuit law, if you  
23 apply Fifth Circuit law, you have special circumstances you  
24 need to look at. I think the special circumstances here is the  
25 defendant's characterizations of the prior claims. Again, not

1 the characterizations of the invention but the  
2 characterizations of the prior claims and what they did not  
3 include and what now clearly they do include.

4       So *Ohio Willow Wood*, you know -- if the differences  
5 between the unadjudicated claims and the adjudicated claims do  
6 not materially alter the question of invalidity, collateral  
7 estoppel applies. Here the differences materially alter the  
8 claim, just like obviousness-type double patenting. Those  
9 differences, again, not under a domino approach, not under a  
10 "let's take this off one by one," but as a whole, do those --  
11 are there differences there? That's what is referred to there  
12 as the *Graham* factors.

13       And so, again, we have the web is the network in 1993.  
14 Very different. Not obvious to do this on the web. What we  
15 labeled "security" but really goes to the "configured with"  
16 language, that the browser has to be configured with these  
17 interactive applications and then one of those applications, if  
18 it's configured with, can be selected, that's a material  
19 difference.

20       And here, don't even use the word "scalability."  
21 "Distribution," "coordination," the "viewing transforms" -- we  
22 didn't even really talk about that -- being done on the server  
23 side, that is another difference.

24       And, again, here if you go to Exhibit 1, Dr. Martin's  
25 uncontroverted testimony in looking at this as a whole is that

1 these claims are not the same as the prior claims, and what he  
2 says is "the combined changes correspond to significant changes  
3 in claim scope."

4 So, again, those special circumstances, the defendants  
5 before said prior claims, don't have to be a web browser. Just  
6 any browser. Well, now clearly they do. There can be no  
7 question that there has to be a web browser.

8 Defendants said no security issues at all with the -- with  
9 the prior claims. Well, now, given the "configured with"  
10 language, Dr. Martin and Dr. Doyle's declaration teach you --  
11 and there is no controversy, there is no dispute, there is no  
12 contrary evidence to this -- that "configured with" language  
13 provides the user with control and security, unlike that was  
14 talked about in the prior art claims.

15 Just briefly, because the Court particularly asked about  
16 the cases, *Ohio Willow Wood*, again, it's only a page. The  
17 appeal there was just the different language was enough. The  
18 Federal Circuit said, "No, and you haven't told me why the  
19 different languages is not substantially similar, so you lose."  
20 Okay. Well, that's fair. The language here is different.

21 *Bourns*, there was two arguably new features, but then the  
22 defendants pointed to prior art with those features, and the  
23 patentee admitted they were in the prior art. We don't have  
24 that here. In fact, as Your Honor pointed out, I think the  
25 defendants say, "Oh, you don't have to look at the prior art.

1 You can just look at the prior claims." Well, okay. Then, I  
2 mean, we don't think it's in the prior art, but since you can't  
3 look at the prior art, the differences there then control the  
4 analysis. We don't even have to worry about *Bourns* and looking  
5 in the prior art.

6 And *Soverain*, it was just a single dependent claim that  
7 said put it on the Internet. No explanation of why that was  
8 important. Here in '93 -- looking at it from a 1993  
9 perspective, we know that's different.

10 And so we can't focus on inventor and expert testimony,  
11 but we've got to focus on the claims and how are they  
12 materially different. And if they -- the concepts were known,  
13 the defendants would point to prior art that shows web-related  
14 technology, interactive technology, which they can't in '93.  
15 They would show a browser configured with these applications,  
16 which they can't. They would show the VIS coordination  
17 computer, the coordination and the viewing transformations, and  
18 they haven't been able to do that.

19 Kessler doctrine, this was -- I'm not sure if it was  
20 touched on or not, but just like -- just like collateral  
21 estoppel, the Kessler doctrine exams whether the claims --  
22 again, not individual limitations -- and products are  
23 essentially the same as the previously-adjudicated claims and  
24 products. Again, the Kessler doctrine is going to rise -- is  
25 going to fall -- it's not going to rise -- it's going to fall

1 just like the obviousness-type double patenting doctrine. Once  
2 you see the differences and appreciate the differences between  
3 the claims, the Kessler doctrine doesn't apply because the  
4 claims are not essentially the same.

5 The party asserting the Kessler doctrine has the burden  
6 here. We went through the differences. The web is the  
7 network. Again, in 1993, very different. Not obvious. The  
8 "configured with," the browser configured with. Again, not  
9 obvious. Different. The distribution and coordination.

10 So it's the same three limitations because I think the  
11 test, once you apply it to the obviousness-type double  
12 patenting include the claims are different, that makes  
13 collateral estoppel and Kessler doctrine easy to deal with.

14 Dr. Martin's testimony again, at least as to the  
15 combination, is -- is uncontroverted. And the secondary  
16 considerations also support the lack of similarity. We talked  
17 about those, the teaching away from people like Mr. Andreessen,  
18 the failure of people like Mr. Wei, and the praise from people  
19 like Mr. Hardin.

20 Just briefly to touch on the products, I don't think you  
21 need to even get here because you deal with it as a matter of  
22 the claims, but the defendants really just asked the Court to  
23 assume that if they say the products are JavaScript technology,  
24 then they're the same. Of course in the last trial, which  
25 was -- is it eight years ago now -- I guess it was four years

1 ago we wanted to deal with this. Maybe it was eight years ago  
2 that the trial was, if I have my timeline right. Things  
3 change, as Your Honor, of course, knows over eight years.  
4 There is no showing that the prior versions of products that  
5 are the same -- named the same are essentially the same, and  
6 just because they use JavaScript and JavaScript technology,  
7 even assuming that fact, doesn't make them the same, and  
8 that's -- and that's what they would have to show here.

9 So just because there are prior versions of -- and then of  
10 course for differently-named products -- and some of those  
11 exist here, too -- there's no showing that they're the same.  
12 Again, it's kind of just *well, assume that JavaScript and Java*  
13 *technology is working on those products, and, well, they're the*  
14 *same*. That's not a sufficient showing to meet your burden that  
15 those things are the same.

16 So that's another reason that the Kessler doctrine fails,  
17 although I think it fails before you even need to get to the  
18 products. It fails on the claims.

19 I left two minutes. Is there any questions that the Court  
20 has?

21 **THE COURT:** I don't have any. I'm going to move my  
22 4:00 back a few minutes.

23 Mr. Verhoeven -- first of all, how do you pronounce your  
24 last name? You're on mute.

25 **MR. VERHOEVEN:** It's "Ver-hoe-ven," the emphasis on

1 the middle syllable.

2 **THE COURT:** Mr. Verhoeven, you and Mr. Lumish have  
3 five minutes to split, and then I will give Mr. Campbell five  
4 minutes to split. It's not much, but it's all I have.

5 **MR. VERHOEVEN:** Okay. I am going to share my screen,  
6 so you could you please take off -- thank you. I don't know  
7 how to go to slide 51 really fast.

8 Your Honor, in my slide 51 -- I'll keep talking. Maybe  
9 I'll get to it -- I want to address really briefly the security  
10 issue. In slide 51, I have a comparison -- if I can ever get  
11 there -- here it is.

12 **MR. CORREDOR:** If you just type "51," enter, you will  
13 get there.

14 **MR. VERHOEVEN:** Here you go.

15 This is the language, Your Honor, that the plaintiff is  
16 pointing to for all of their scalability requirements. Okay?  
17 It's the same thing as claimed in claim 40 of the '985 patent.  
18 And none of this language has anything to do with scalability.  
19 "Select an internet interactive content application." Okay. I  
20 made my point.

21 Next point, there is discussion of plaintiff's expert,  
22 Dr. Martin, Your Honor, and, you know, obviously experts are  
23 hired by the parties and whatnot. What I found really  
24 interesting about Dr. Martin's recent declaration is to quote a  
25 complete inconsistency of that declaration with his, in this

1 case, prior infringement report. In his infringement report,  
2 he doesn't say scalability is a requirement. He doesn't say  
3 security is a requirement. He doesn't say there's a  
4 requirement that you have to be able to scale up a big, high  
5 number. He doesn't go on to compare those requirements with  
6 any of the accused products. Why? Because they're not there.  
7 And his latest declaration is just, you know, argument and  
8 should be accorded no weight.

9 The next point, slide -- on the scalability, I won't --  
10 I'll just say the claim language doesn't say "scalability."  
11 I've got two slides showing what they say and what the claim  
12 language says, and it doesn't say that. What they point to for  
13 scalability is the coordination elements of the claim.

14 **THE COURT:** I think you're going to win this point.

15 **MR. VERHOEVEN:** Okay. Then I have nothing further.

16 **THE COURT:** Mr. Lumish.

17 **MR. LUMISH:** Thank you, Your Honor.

18 The only point I think I have time to make is that the  
19 second best case they could come up with for collateral  
20 estoppel after *Ohio Willow Wood* -- Charlie, can you stop  
21 sharing your screen, please -- was the *Bourns* case.

22 **THE COURT:** He cited all your cases. I gave myself  
23 the homework of reading those three cases anyway after this  
24 hearing, even if nobody mentioned them, so I'll read *Bourns*.  
25 Is that the one you were going to pick?



1           **MR. LUMISH:** It is, Your Honor. I think -- no. He  
2       picked it. He said *Bourns* was his best case --

3           **THE COURT:** That's what I'm saying.

4           **MR. LUMISH:** -- after *Ohio Willow Wood*.

5           **THE COURT:** That's what I'm saying. He cited your  
6       cases.

7           **MR. LUMISH:** Agreed, Your Honor. What I wanted to  
8       stay about it was the court finds in *Ohio Willow Wood* -- it's a  
9       1976 court case decision. They find collateral estoppel  
10      applies to kill the unadjudicated claims even though there are  
11      differences in those claims. So they found that the  
12      unadjudicated claims had hollow rivets, that they had a cover  
13      that the other claims didn't have, and that they were oriented  
14      so that the cover was in cooperation with the slider so the  
15      slider wouldn't move around and break things.

16           None of that stuff was in the unadjudicated claims, and  
17      they still found collateral estoppel applied, and those are  
18      more substantive differences than anything Mr. Campbell could  
19      show you today.

20           **THE COURT:** Okay. That was fast.

21           **MR. VERHOEVEN:** Well, could I just say one more thing?  
22      I'm sorry, Your Honor.

23           **THE COURT:** Go ahead.

24           **MR. VERHOEVEN:** There was a point made about the  
25      products not being the same with Kessler. The prior action was

1 an invalidity verdict, and so the preclusion is that they can't  
2 walk away from that invalidity verdict.

3 **THE COURT:** Yes. I think I have your point.

4 **MR. VERHOEVEN:** Yes. Thank you, Your Honor.

5 **THE COURT:** Okay.

6 Mr. Campbell?

7 **MR. CAMPBELL:** Yes, Your Honor.

8 **THE COURT:** You can even say some more things, if you  
9 want.

10 **MR. CAMPBELL:** Great. I'd love to.

11 **THE COURT:** As long as you fit it in five minutes.

12 **MR. CAMPBELL:** Five minutes.

13 **THE COURT:** It's like a game show where they open the  
14 door and you can run around and fill up your basket.

15 **MR. CAMPBELL:** All right. I'm not sure what to shop  
16 for, but I will respond to -- I will respond to what was just  
17 said there.

18 The first thing I would say is that I -- I -- I know the  
19 Court will do this. Just encourage the Court to. The focus is  
20 on the claim language. Right? We've never disputed that.

21 The fact that -- I don't -- I don't understand the -- the  
22 focus on the label of "security" and "scalability." Those  
23 things -- nobody has disputed those things result from the  
24 claim language. We labeled them --

25 **THE COURT:** You keep saying that. You gave them those

1 labels.

2 **MR. CAMPBELL:** You're right.

3 **THE COURT:** People are using labels you gave them,  
4 aren't they?

5 **MR. CAMPBELL:** You're right. We wanted to, rather  
6 than --

7 **THE COURT:** That's why they're doing that, because you  
8 did that. That's all.

9 **MR. CAMPBELL:** Rather than write a brief where we just  
10 repeatedly quoted that claim language, we said what it did.  
11 It's much more accessible that way to read a brief, in my view,  
12 to say -- call it -- to talk about the language, call it  
13 "security" because that's what it provides, and there is no  
14 evidence other than Dr. Martin and Dr. Doyle saying that that's  
15 what it provides. Nobody had disputed that before.

16 To call it "scalability" rather than -- I mean, that  
17 language is a lot of language.

18 My only point is let's focus on the claim language, and  
19 the language that was put up by counsel is only part of it, of  
20 where the "security" comes from, but the language, right, that  
21 "the browser has been configured with a plurality of different  
22 interactive content applications," and Dr. Martin explains at  
23 paragraphs 36 -- 37 to 38 how that language is a meaningful and  
24 non-obvious difference over the claims. He explains in great  
25 detail, particularly in claims 40 -- in paragraphs 47 to 48 why

1 the language about coordination and distribution is very  
2 different than the prior claims.

3 That claim language is what we are relying on as being  
4 very different and distinctions over the prior claims, which is  
5 exactly what the Patent Office, even though they didn't see a  
6 distinction in three prior or four prior continuation  
7 applications and wanted to know what the distinction was  
8 here -- that's the distinction they saw.

9 I don't -- again, I don't even -- Dr. Martin -- there is no  
10 inconsistency. There is no evidence in the briefs. I don't  
11 know what inconsistency is being talked about.

12 Again, we want to focus on the claims, not the language  
13 that we used to try to make the brief more -- more interesting,  
14 more readable, to focus on what was understood to come out of  
15 those claims.

16 And, you know, on collateral estoppel, *Ohio Willow Wood*  
17 and *Bourns* -- look, if you just want to look for a case that --

18 **THE COURT:** It's --

19 **MR. CAMPBELL:** -- comes out the way you want to come  
20 out in terms of affirm or reverse, okay, those claims --

21 **THE COURT:** Believe me, it puts me in a privileged  
22 position when everybody cites the same cases.

23 **MR. CAMPBELL:** Those cases don't have the result that  
24 we want, but I think when you look at the legal test, which I  
25 think is what the Court is more interested in, the legal test

1 described in those cases and the analysis for *is this different*  
2 *or are you just relying on differences in language* -- the legal  
3 test in those cases leads to the result here that collateral  
4 estoppel doesn't apply. Just because it led to the result in  
5 those cases that collateral estoppel doesn't apply, in my view,  
6 doesn't make them bad cases for us. They're still good cases  
7 for us. It's the legal test explained in the correct way and  
8 applied to our case leads to the correct result of no  
9 collateral estoppel.

10 I may -- I think I used my five minutes. If I didn't --

11 **THE COURT:** I will take that as a stipulation. That's  
12 okay. I'm late for something else.

13 **MR. CAMPBELL:** Okay. Very good. I appreciate your  
14 time, Your Honor.

15 **THE COURT:** Thank you all for your arguments today.

16 **MR. VERHOEVEN:** Thank you, Your Honor.

17 **THE COURT:** I feel we've covered the waterfront.

18 If you could email your three PowerPoint presentations to  
19 the CRD email address on the Northern District web page for my  
20 chambers, that would be great. And I think that concludes this  
21 hearing. Thank you.

22 (Proceedings adjourned at 4:08 p.m.)  
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Thursday, September 23, 2020

*Pamela Batalo Hebel*

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Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR  
U.S. Court Reporter